

MISSISSIPPI LAW JOURNAL



ARTICLES

CIVIL LIABILITY UNDER THE MISSISSIPPI
SECURITIES ACT

E. Clifton Hodge, Jr.

WRONGFUL DEATH DAMAGES IN MISSISSIPPI

Semmes Luckett and Stephen L. Thomas

CONGLOMERATE MERGERS: A NEGLECTED ASPECT

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EDITOR'S NOTE

This issue, which contains the General Index for Volume 43 and the 1972 Mississippi State Bar Directory, completes another volume of the Mississippi Law Journal and hopefully marks the beginning of a new era for the Journal.

We have recently made many changes in the Journal, both as a publication and as an organization. The current self-analysis is probably the most vigorous since the genesis of the Mississippi Law Journal in 1928. Perhaps the most fundamental physical change is the increase in annual publication from four to five issues, which will be published regularly in January, April, June, September, and November. This results in a concomitant increase in pages from approximately six hundred to nine hundred pages per volume. Pursuant to an agreement with the Bar officers and commissioners, proceedings of the annual Mississippi State Bar meetings will no longer be routinely published in the Journal. We have instituted a recent decision section in which important cases are succinctly noted. Plans are being formulated for a better indexing arrangement in future volumes. The Journal will obtain a copyright for each future issue. In addition, other less obvious changes have been made.

As for the internal organization, Journal membership has burgeoned. Two additional Editorial Board positions have been created. Students are now selected for Journal membership on the basis of a writing competition, as well as their scholastic achievements. We have established a scanning operation to examine court decisions from a variety of jurisdictions and sources.

The Mississippi Law Journal endeavors to achieve at least two basic goals: to inform the legal community and to serve as a forum for scholarly expression and participation. While we believe that the Journal has tacitly achieved these goals, we strive to further enhance it as an institution by continued growth and insistence on quality.

The Journal encourages more participation by its reading audience—either by contributing articles, topic suggestions, or criticisms. The past forty-five years have nurtured a distinguished Mississippi Law Journal tradition; and with the flowering of this tradition, we envision a proliferation of seeds for the future. As the legal community progresses and the law school is blessed with new facilities, the Journal will remain an integral part and a source of new ideas and developments.

Kenneth W. Barton
Editor-in-Chief

CIVIL LIABILITY UNDER THE MISSISSIPPI SECURITIES ACT

*E. Clifton Hodge, Jr.**

I. INTRODUCTION

The regulation of the issuance and exchange of securities in the United States was initiated at the state level.¹ Kansas passed the first general securities law in 1911,² and it was in Kansas that the term "Blue Sky Law" was first used to describe legislation aimed at promoters who "would sell building lots in the blue sky in fee simple."³ When the first federal securities legislation was enacted in 1933, forty-seven states and Hawaii had enacted Blue Sky Laws.⁴ The subsequent development of federal securities regulation is well documented and such regulation will be discussed only to the extent that it contributes to an understanding of the main topic herein. Similarly, the various state Blue Sky Laws, except for the effect of the Uniform Securities Act,⁵ are so diverse that they can be used meaningfully only in a comparison of specific provisions. Generalizations, summaries, and statistical facts about state Blue Sky Laws are beyond the scope of this article.⁶

This article is concerned primarily with the Mississippi Blue Sky Law, which is officially referenced as the "Mississippi Securities Act."⁷ As the title of this article indicates, attention will be focused on the civil liability which exists under this statute. The reason for the concentration on civil liability is twofold. First, a more general discussion within the confines of this article would be useless. Secondly, in a state such as Mississippi where funds available for the administrative regulation of securities are definitely limited, civil liability may be the only

*B.B.A., J.D., University of Mississippi, LL.M., Harvard University; Butler, Snow, O'Mara, Stevens & Cannada; Jackson, Mississippi.

¹L. Loss, SECURITIES REGULATIONS 23 (1961). See generally 1 L. Loss, *supra*, at 3-128 for a history of the securities regulation prior to the Federal Security Act of 1933.

²*Id.* at 25.

³*Id.* at 27, quoting Mulvey, *Blue Sky Law*, 36 CAN. L.T. 37 (1916).

⁴1 L. Loss, *supra* note 1, at 30.

⁵L. Loss & E. Cowett, BLUE SKY LAW 245-420 (1958).

⁶For the only significant endeavor at such compilations see L. Loss & E. Cowett, *supra* note 5.

⁷MISS. CODE ANN. §§ 5360-5390 (Supp. 1971).

effective means of enforcement.⁸ To understand civil liability under an act, one must first understand the general provisions of the entire act. Therefore, in order to place the civil liability provisions in proper focus, all aspects of the Mississippi Securities Act (hereafter alternatively referenced as Mississippi Act or Mississippi Blue Sky Law) will be presented in summary fashion. After the description of the substantive scheme of the Mississippi Act, there will be presented a detailed analysis of civil liability under the Mississippi Act, with occasional reference to the Uniform Securities Act and other state Blue Sky Laws, with the ultimate goal being suggestions as to how civil liability can be most effectively used for securities regulation in Mississippi. Because this article is confined to a narrow topic on which there is very little authority, the verbose footnotes which are traditional in law review articles will be noticeably absent.

II. THE MISSISSIPPI BLUE SKY LAW

First enacted in 1916,⁹ the Mississippi Act has remained relatively unchanged since 1930 when the original act was first amended.¹⁰ Further amendments followed in 1932,¹¹ 1942,¹² 1958,¹³ and 1964.¹⁴ The changes in 1958 merely refined the 1942 statute and the 1964 amendment was insignificant, so that the present statute is substantially the same as the 1942 statute.¹⁵

In accordance with the general pattern of most state Blue Sky Laws, the Mississippi Act has three types of regulatory provisions: (1) provisions requiring the registration of certain persons in the securities business; (2) provisions requiring the registration of certain securities; and (3) provisions creating liability for failure to comply and for fraudulent activities. In the ensuing discussion an attempt will be made to keep these different areas of regulation in mind.

⁸"The inadequate budgets and uneven enforcement of the blue sky laws make civil liability the only effective sanction in many states—perhaps most states." 3 L. Loss, *supra* note 1, at 1631.

⁹Act of April 3, 1916, ch. 97 [1916] GEN. LAWS MISS.

¹⁰MISS. CODE ANN., ch. 100, art. 2 (1930).

¹¹Act of May 18, 1932, ch. 88 [1932] GEN. LAWS MISS.

¹²Act of March 19, 1942, ch. 297 [1942] GEN. LAWS MISS.

¹³Act of May 8, 1958, ch. 202 [1958] GEN. LAWS MISS.

¹⁴MISS. CODE ANN. §§ 5360-5390 (Supp. 1971).

¹⁵For a discussion of the history of the Mississippi Blue Sky Law, see Stevens & Little, *Offer and Sale of Corporate Securities* in PROCEEDINGS OF THE TWENTIETH ANNUAL MISSISSIPPI LAW INSTITUTE ON CORPORATE PRACTICE 66-70 (1965).

A. Which Persons Must Register?

Generally, there are two categories of persons who must register under the Mississippi Act: (1) the company which actually issues the security, which may or may not be involved in selling the security; and (2) the salesman of the security who may or may not be associated with the issuing of the security. Broadly speaking, the former is referred to as an "investment company," and the latter is referred to as a "dealer" or "agent."

Section 5362 of the Mississippi Act provides that any "investment company" must register with the secretary of state before selling or offering for sale any security in the state of Mississippi. Section 5361 (a) defines a domestic investment company as "[e]very person, corporation, copartnership, limited partnership, company or association" organized in the state of Mississippi which sells or offers for sale any security within Mississippi.¹⁶ Section 5361 (b) defines a foreign investment company as being "[e]very such person, corporation, copartnership, limited partnership, or association" which is a resident of or organized in any state or territory other than Mississippi. There is no apparent reason for limiting domestic investment companies to those selling or offering to sell stock, while not so limiting the definition of foreign investment companies. Technically, under sections 5361 (b) and 5361 (g) every individual who is a resident of a state other than Mississippi is a "foreign investment company." Section 5361 (c) defines a security as being:

[A]ny stocks, treasury stock, bond, debenture, transferable certificate of interest or participation, certificate of interest in an oil, gas, or mining title or lease, trust certificate, monthly installment savings bond or certificate, diversified trustee shares,

¹⁶The 1932 Act did not in its definition of "domestic investment company" contain the term "limited partnership." The inclusion of this term in the 1958 Act has allowed Mississippi to avoid the conflict of authority on the applicability of state blue sky laws to the sale of limited partnership interests. See Opinion of Attorney General of Georgia, 3 CCH BLUE SKY L. REP. ¶ 70,830 (1969) (Act applicable to investment club formed as a limited partnership); Opinion of the Attorney General of North Dakota, 3 CCH BLUE SKY L. REP. ¶ 70,799 (1969) (Act applicable to sale of limited partnership interests); Opinion of the Attorney General of Minnesota, 3 CCH BLUE SKY L. REP. ¶ 70,713 (1966) (General partner under the Uniform Limited Partnership Act was not an investment advisor under Blue Sky Law); Opinion of Attorney General of Nevada, 3 CCH BLUE SKY L. REP. ¶ 70,691 (1965) (Sale of limited partnership interests to more than 24 persons requires registration under the Blue Sky Law).

or transferable share, investment contract or beneficial interest, whatsoever in, or title to, property or profits, or any instrument commonly known as a security.¹⁷

Section 5361 (f) defines "offer for sale" as "every attempt to offer to dispose of, or solicitation of an order or offer to buy, a security or interest in a security for value."

As can be readily ascertained from these sections, the Mississippi Securities Act has a very broad scope. The rule of thumb is thus: *Any person selling or offering to sell anything remotely resembling a security in the state of Mississippi, unless a specific exemption is applicable, must register with the secretary of state.* The word "person" is used in this rule as it is in the Mississippi Act to include "an individual, a corporation, a partnership, limited partnership, an association, a joint stock company, a trust company or any other unincorporated organization."¹⁸

Section 5372 requires any "dealer" or "agent" desiring to sell or offer for sale any security in the state of Mississippi to obtain a permit from the secretary of state. Section 5361 (d) defines "dealer" as being any person who is wholly or in part in the business of dealing in securities. A "limited dealer" is only authorized to sell a certain issue or class of security.¹⁹ An "agent" is a person appointed by an investment company or dealer to sell securities for compensation.²⁰

A detailed explanation of the procedure by which investment companies and dealers register with the secretary of state is beyond the scope of this article. The important determination for the purposes of this article is whether the person should register and not the manner in which such a registration would be accomplished. The above provisions of the Mississippi Act control which persons must register with the secretary of state, and unless the investment company or dealer is involved with a security for which a specific exemption as hereafter described exists, such company or dealer must register.

B. Which Securities Must Be Registered?

As noted earlier, there is some overlap in describing *who* must register and which *securities* must be registered. As a general rule it is

¹⁷MISS. CODE ANN. § 5361 (c) (Supp. 1971).

¹⁸*Id.* § 5361 (g).

¹⁹*Id.* § 5361 (d).

²⁰*Id.* § 5361 (e).

safe to say that all "securities" (as previously defined) must be registered with the secretary of state before being sold or offered for sale, unless there is specific exemption. Therefore, under this general rule, the exemptions become determinative.

Sections 5384 and 5384.5 describe the securities and transactions which are exempt from the Mississippi Act.²¹ Outside of the civil liability provisions, these two sections are probably the most important to a person desiring to sell a security in Mississippi. A general outline of the exempt securities under Section 5384 is as follows:

(1) *Government Securities*—securities issued or guaranteed by the United States, states, or certain other governments.

(2) *Banks and Loan Associations*—securities issued by banks and loans associations which are supervised by the federal or state government. Capital stock of a loan association is not exempted.

(3) *Domestic Insurance Companies*—securities issued by domestic insurance companies which are subject to supervision by an agency of the state of Mississippi.

(4) *Insurance Policies and Contracts*—certain endowment policies and insurance contracts issued by a person subject to federal or state regulation.

(5) *Railroad or Public Utility*—certain securities issued by a railroad or public utility which is regulated by a state or federal agency.

(6) *Non-Profit Organizations*—securities issued by a corporation organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, hospital or reformatory purposes and not for pecuniary profit.

(7) *Securities Listed on National Securities Exchanges*—securities listed on the national security exchanges which are registered under the Securities Exchange Act of 1934, and all securities senior or equal in rank to any securities so listed.

(8) *Negotiable Promissory Notes or Commercial Paper*.

(9) *Foreign Governments*—securities issued or guaranteed by certain foreign governments with which the United States maintains diplomatic relations.

(10) *Certain Secured Notes and Bonds*—certain notes and bonds secured by a mortgage or deed of trust if the note or bond and security therefor are sold to a single purchaser or at a single sale.

²¹In 1964, section 5384 of the 1958 Act was divided into two parts to separate "exempt transactions" from "exempt securities." Evidently, this was the only change made in 1964. See Editor's Note, Miss. CODE ANN. § 5384.5 (Supp. 1971).

(11) *Co-operatives* — securities of co-operatives organized under the laws of Mississippi where all stockholders and promoters are residents of Mississippi.

(12) *Oil, Gas, or Mineral Lease* — certain mineral leases where the working interest is not less than 1/642.

The exempt *transactions* under section 5384.5 (as opposed to exempt *securities* under section 5384) are as follows:

(1) *Sale by Executor, Administrator, Guardian, Conservator, Regulated Bank or Trust Company or Trustee or Receiver in Bankruptcy* — the exemption for sales by a bank or trust company is limited to situations where the bank or trust company is trustee under a will or trust agreement.

(2) *Sale of Securities by Pledge* — sale of securities by pledgee if sale is in good faith and not for the purpose of avoiding the Blue Sky Law.

(3) *Isolated Transaction* — sale of securities by the owner thereof, other than an issuer or underwriter, when the sale is an isolated transaction and not made in the course of repeated or successive transactions.

(4) *Stock Dividend* — stock dividends or other distributions out of earned surplus.

(5) *Exchange of Stock for Assets or Merger or Consolidation* — securities issued in exchange for all or substantially all of a corporation's assets, and securities issued in connection with a consolidation or merger.

(6) *Stock Exchange* — securities issued by a corporation solely in exchange with its security holders.

(7) *Sale to a Person a Principal Part of Whose Business Consists of Buying Securities* — includes sales to a bank, savings institution, trust company, insurance company, dealer, an agency or instrumentality of the United States or of a state.

(8) *Stock Conversion* — securities issued pursuant to a right of conversion.

(9) *Less Than Ten Shareholders* — the sale of securities where the number of shareholders after the sale does not exceed ten. This exemption requires that said shareholders shall not acquire these securities for the purpose of transfer or resale to others, and when the amount of the sale exceeds \$50,000.00, the shareholders must file a written notice of intent not to transfer the securities.

(10) *Secondary Sales* — sales by a registered dealer of securities previously sold and distributed to the public if information about the issuer appears in a recognized manual of securities at the time of sale.

It can be easily noted that the exemptions in the Mississippi Securities Act encompass most securities transactions. The exemptions have been presented in order to establish the scope of the Mississippi Act before moving into a discussion of civil liability. An analysis of the exemptions brings into focus the type of enterprise with which the Mississippi Act is concerned. It is not a large interstate operation, as such companies are adequately regulated by the federal government. It is not a very small closely held company because such companies do not pose much of a threat to the public. It is not a company which, because of its nature, is already controlled by some agency of the state or federal governments. To put it simply and rather generally, the Mississippi Act is concerned with any enterprise which is not already regulated by an independent body and which solicits investments from the general public in the state of Mississippi.

III. CIVIL LIABILITY

Basically, there are three sources of civil liability in the sale of securities: (1) common law, (2) state Blue Sky Laws, and (3) federal securities statutes.²² Although attention will be directed toward civil liability under the Mississippi Act, the other sources of liability will be mentioned when applicable.

Section 5374 (a) of the Mississippi Act provides that it is unlawful to sell or offer for sale any security in the state of Mississippi for which there is no specific exemption unless the secretary of state has issued his certificate for the sale of such security. This section also makes it unlawful for any person to advertise such security in Mississippi. Section 5374 (b) makes the sale of any security made in violation of "any provisions of this act" voidable at the election of the purchaser. In an action under section 5374 (b) the purchaser must tender the security and all income which has been derived from the security. The action must be brought within two years after the purchaser discovered or reasonably should have discovered the violation. The purchaser is entitled to recover the full amount paid for the security, with interest from the date of purchase.²³

Section 5371 is the other civil liability provision in the Mississippi Act. This section allows a purchaser to recover the amount paid for a security, interest from the date of purchase, and reasonable attorney's fees where the purchaser was induced to buy a security by misrepresentation

²² L. Loss, *supra* note 1, at 1623.

²³ MISS. CODE ANN. § 5374 (b) (Supp. 1971).

of a material fact concerning the security. This section permits suit only on the investment company's bond which must be posted with the secretary of state in accordance with Section 5365. Therefore, liability exists under 5371 only when the issuer of the security has complied with the Blue Sky Law and has posted bond.

Under these two civil liability provisions in the Mississippi Act (sections 5374 (b) and 5371) liability can thus be created either by selling a security in Mississippi in violation of some provision of the Mississippi Act or by selling a security through inducement by misrepresentation of a material fact.

Throughout the remainder of this article reference will be made to sections 5374 (b) and 5371, the two basic civil liabilities sections of the Mississippi Act. To avoid confusion, it is important to elaborate upon the respective roles of these two sections. An action can be had under Section 5371 *only if the seller has complied with the Mississippi Act and has posted a bond pursuant to section 5365*. In such a situation the action is brought upon the bond, and the basis of the action must be that the sale of the security was induced by a misrepresentation of a material fact. Section 5374 (b), on the other hand, is simply a provision for statutory rescission and provides that any sale of a security made in violation of any provision of the Mississippi Act is voidable at the option of the purchaser.

It can be noted, therefore, that if a security is sold in Mississippi and was not registered pursuant to the Mississippi Act, the purchaser would have an action for statutory rescission under section 5374 (b). No action would lie under section 5371 because the security had not been registered and no bond had been posted.

If the security is properly registered and the sale induced by misrepresentation of a material fact, an action would prima facie lie under section 5371 upon the bond posted for the security. An action for statutory rescission would also lie under section 5374 (b) because the sale would have been in violation of section 5380, the general anti-fraud provision of the Mississippi Act.

The interrelation of these two civil liability provisions is unnecessarily confusing. In the following discussion of the Mississippi Act, an attempt will be made to clarify the relevant differences between the two sections.

A. Liability on Surety Bonds

Section 5365 provides that before selling securities in Mississippi an investment company must post a bond in the amount of 5 percent of

the total aggregate offering price and that the bond shall not be for an amount less than \$500.00 nor more than \$50,000.00. Several questions have arisen with regard to this bond which must be posted by investment companies.

A series of cases against the Nu Pine Corporation in the late 1950's is especially illuminating on this subject. An action was brought by one Rice against the trustee in bankruptcy for Nu Pine Corporation and the surety on the bond in the amount of \$10,000.00 which the corporation had posted with the secretary of state pursuant to the Mississippi Act. Rice alleged that he had been induced to purchase Nu Pine stock through the use of false and fraudulent statements on the part of the Nu Pine salesman. The chancellor dismissed and held that he did not have jurisdiction because Nu Pine had not been discharged from bankruptcy proceedings in federal court. On appeal the Mississippi Supreme Court reversed, citing the rule that discharge from bankruptcy does not alter the liability of a surety.²⁴

In a decision rendered the same day as the above described *United States Fidelity & Guaranty Co. v. Rice* decision, the Court made a similar ruling in *Hederi v. United States Fidelity & Guaranty Co.*,²⁵ which was another action against Nu Pine's surety. The Mississippi Supreme Court stated:

The clear purpose, under the statute, for the execution of the \$10,000.00 bond was to protect purchasers of stock in the corporation against loss on account of the misrepresentation of any material fact concerning such stock. As expressly provided by the statute, a right of action on the bond arose to them for such damages as they sustained thereby, together with interest and reasonable attorneys' fees.²⁶

In the *Rice* and *Hederi* cases, the surety on the bond did not answer the complaint. However, while Rice and Hederi were awaiting the appeal of their cases to the Mississippi Supreme Court, Talmadge H. Heard brought an action before a different chancellor against Nu Pine's surety. This time the surety answered and denied liability. A trial ensued and the complainant won a verdict against the surety in the amount of \$10,000.00.²⁷ After remand by the Mississippi Supreme

²⁴*United States Fid. & Guar. v. Rice*, 241 Miss. 307, 130 So. 2d 924 (1961).

²⁵237 Miss. 251, 253, 114 So. 2d 615, 616 (1959).

²⁶*Id.*

²⁷For a description of the *Heard* suit, see *United States Fid. & Guar. v. Rice*, 241 Miss. 307, 130 So. 2d 924 (1961).

Court in the *Rice* and *Hederi* cases as described above; Rice and Hederi put forth the same contentions that they had previously made. This time the surety claimed that it was not liable because the full amount of the bond (\$10,000.00) had been paid to Heard. The chancellor held that the surety was estopped to plead payment of the entire penalty and held for Rice in the amount of \$1,751.25 and Hederi in the amount of \$1,167.50, with additional amount in both instances for attorneys' fees.

The Mississippi Supreme Court affirmed the chancellor's finding that the surety was estopped to claim full payment, notwithstanding a specific provision in the applicable statute that a recovery on a bond could not exceed the penalty thereof, because failure to inform the chancellor in the *Heard* case of the existence of the other two previously filed cases constituted constructive misrepresentation.²⁸ The court interestingly noted that Heard was listed in the prospectus supplied by Nu Pine as being a director of the company, and the court stated that there was some doubt as to whether a director could sue on the bond.²⁹

The Nu Pine litigation is significant because the court allowed recovery for an amount exceeding the amount of the bond posted by Nu Pine. The peculiarity of the three cases involved in this litigation makes it unlikely that the court will find another occasion to go against the express limitation in section 5371 that recovery thereunder cannot be for an amount in excess of the bond posted pursuant to section 5365. Nevertheless, the cases demonstrate that the Mississippi Supreme Court can be flexible in its consideration of cases arising under the Mississippi Act.

The case of *New Amsterdam Casualty Company v. Wood*³⁰ sheds more light on the liability under the Mississippi Blue Sky Law. In this case the surety had assured two bonds. The offering for which the first bond was posted was limited by the secretary of state to preferred stock "and none other"; but the posted bond was not so limited. The court held that the surety was liable for the amount of both bonds for the fraudulent sale of stock covered by the second bond, because the bond had not been limited to preferred stock as had been the secretary's authorization. This case shows that the wording of the coverage of the bond cannot be lightly regarded. It also shows that the bond will be strictly construed in favor of the investing public.

²⁸United States Fid. & Guar. v. Rice, 241 Miss. 307, 130 So. 2d 924 (1961).

²⁹*Id.* at 316, 130 So. 2d at 927.

³⁰213 Miss. 499, 57 So. 2d 141 (1952).

In *Irving v. Bankers' Mortgage Co.*,³¹ the Mississippi Supreme Court upheld a verdict under the Mississippi Act and held that the surety on the bond need not be joined in an action under this law. The defendant had claimed that there was no action under the Mississippi Act because the surety was not joined and because liability under the conditions of the bond was not evoked. The court rejected this contention stating: "The liability of the surety is measured by that of its principal, and a party having a right of action under these statutes may proceed against the principal without joining the surety."³²

The secretary of state, with the approval of the attorney general, can cancel any bond filed in accordance with the Mississippi Act after the sale of the securities has been completed. The secretary of state can also release the surety from further liability.³³ As stated previously, the bond is 5 percent of the total aggregate offering price of the securities, but not less than \$500.00 nor more than \$50,000.00.³⁴ The bond is conditioned upon the truthfulness of all information submitted to the secretary of state and upon the sale of securities in compliance with all provisions of the Mississippi Act.³⁵ Recovery upon the bond should not exceed the full amount of the bond, and if a suit is filed against the principal or surety in excess of the amount of the bond, the secretary of state may require a new bond.³⁶

The Uniform Securities Act contains a bonding provision which is more flexible than the Mississippi bonding provisions.³⁷ The Uniform Act leaves the posting of the bond and the conditions thereof at the discretion of the administrator, and the maximum amount of the bond is \$10,000.00.³⁸ On the other hand, the bond is mandatory under the Mississippi Act, the condition is compliance with the statute, and the maximum amount is \$50,000.00.³⁹ The Uniform Act provides that no bond may be required of a registrant whose net capital exceeds \$25,000.00. There is no comparable limitation in the Mississippi Act.

The requirements under Mississippi's bonding provisions are very strict. The cases discussed above indicate that the Mississippi courts

³¹169 Miss. 890, 151 So. 740 (1934).

³²*Id.* at 896, 151 So. at 743.

³³MISS. CODE ANN. § 5383 (Supp. 1971).

³⁴*Id.* § 5365.

³⁵*Id.*

³⁶*Id.* § 5371.

³⁷See 3 L. Loss, *supra* note 1, at 1654-61. The full text of the Uniform Securities Act may be found in 9c UNIFORM LAWS ANN. 68-149 (1957).

³⁸3 L. Loss, *supra* note 1, at 1654.

³⁹See text *supra*.

will not hesitate to be adamant in protecting a defrauded investor who brings an action against the surety on a bond filed pursuant to the Mississippi Act. The strict requirements of the Mississippi Act are well justified and are preferable to the lenient bonding provisions of the Uniform Securities Act. The Mississippi Act must have "teeth" unless it is to become a "paper tiger."

It has been noted that the broad exemptions exclude most securities transactions from the scrutiny of the administrator and civil liability. For those few transactions and companies not exempted, should there be merely a discretionary and limited bonding procedure? It is admitted that uniformity is needed in the *procedure of registering* under the state Blue Sky Laws, but why should there be uniformity in the bonding procedures? A state such as Mississippi with insufficient funds to support an elaborate administrative system for securities regulation should have civil liability provisions with substance. In many cases where the investor has been defrauded, the company will be bankrupt. An adequate bonding provision can protect such a defrauded investor.

B. Who Can Bring an Action Under the Mississippi Act?

Under section 5374 a sale of a security made in violation of the Mississippi Act is "voidable at the election of the purchaser," and under section 5371 the purchaser of a security has a right to bring suit to recover money paid for a security when the purchase was induced by the misrepresentation of a material fact. Therefore, under the two civil liability provisions only the "purchaser" of a security may bring suit.

Other than the statute of limitations, the most frequently encountered obstacle to a security purchaser bringing an action is the fact the said purchaser actively participated in the business venture which issued the security. A basic theory which prohibits success in a suit by a purchaser who has actively participated in the business enterprise is that of *in pari delicto*, which means that when both parties are equally wrong, "the position of the defendant is stronger."⁴⁰ This maxim dictates that a court will not grant a remedy when such a situation is presented.⁴¹ Also, some courts have held that the doctrine of equitable estoppel can be used to defeat a purchaser's claim that the sale of a security was invalid because it violates the state Blue Sky Law.⁴² The

⁴⁰Annot., 84 A.L.R.2d 479, 491 (1962).

⁴¹*Id.*

⁴²*Id.* at 485.

Supreme Court of Nebraska has recently given a succinct statement concerning the situations in which estoppel or *pari delicto* will defeat a purchaser's claim, to wit:

Conduct which constitutes participation sufficient to estop a purchaser or place him *in pari delicto* is difficult to generalize or define. Generally speaking, cases holding that the purchaser's conduct placed in *pari delicto* are those in which the purchaser's participation was in the original organization and management, or was prior to or in connection with the sale of the securities to him, or where his participation involved illegal securities transactions.⁴³

An example of how far the theory of estoppel can be taken is the Tennessee case of *Tucker v. McDell's, Inc.*⁴⁴ In this case, the plaintiff had purchased 50 shares of stock in the defendant corporation for the price of \$5,000.00. After purchasing this stock which had been issued in violation of the Tennessee Blue Sky Law, the plaintiff became a director and vice-president of the defendant corporation. The corporation was not successful, and liquidation proceedings were begun. The plaintiff tendered his stock and asked for the purchase price plus interest. The court held that plaintiff was estopped from rescinding his stock purchase because he had taken an active part in the management of the corporation, notwithstanding the fact that the active participation occurred only *after* plaintiff had purchased this stock.

Similar to the estoppel and *pari delicto* cases where the purchaser has actively participated in the issuing company are the "joint venture" cases. There is a conflict of authority over whether interests sold in pursuance of a joint venture must be registered under the state Blue Sky Laws. Some courts hold that since members of a joint venture group have equal rights in management and control of an enterprise and since profits from the venture would not be "solely from the efforts of others," the sale of securities therein does not fall within the scope of state securities regulation.⁴⁵ Other courts hold that if joint venturers decide to use the corporate form and *prima facie* subject themselves to state securities regulation, they will not be excused therefrom simply because the enterprise has the characteristics of a joint stock venture.⁴⁶

⁴³*Loewenstein v. Midwest Inv. Co.*, 181 Neb. 547, 149 N.W.2d 512, 515-16 (1967).
See also *Nash v. Jones*, 224 Ga. 372, 162 S.E.2d 392 (1968).

⁴⁴50 Tenn. App. 62, 359 S.W.2d 597 (1961).

⁴⁵*See, e.g.*, *Polikoff v. Levy*, 55 Ill. App. 2d 229, 204 N.E.2d 807 (1965).

⁴⁶*See, e.g.*, *Jackson v. Roberson*, 90 Ariz. 405, 368 P.2d 645 (1962).

A joint venture exists when there is "a community of interest in the accomplishment of a common purpose, a mutual right of control, a right to share in the profits and a duty to share in such losses as may be sustained."⁴⁷ The most prevalent test to determine whether a joint venture exists is the aforementioned characteristic of profits coming "solely from the efforts of others." This test was first announced by the United States Supreme Court in the case of *SEC v. W. J. Howey Co.*⁴⁸ in which it was held that there is an "investment contract" for purposes of the Securities Act of 1933 where "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."⁴⁹

The purchaser of a security is under no obligation to discover a violation of the state Blue Sky Law, but actual knowledge of the illegality of a sale of securities may prevent the purchaser thereof from recovering.⁵⁰ Under this reasoning a purchaser's participation in the issuing company may not be sufficient for the theories of *pari delicto* or estoppel, but may be sufficient to charge him with knowledge of the illegality.

No Mississippi case similar to those cited above has been found to limit the scope of "purchaser" as that word is used in sections 5371 and 5374 (b). Likewise, no case has been found where a Mississippi court denied a purchaser's action for rescission on the ground of *pari delicto* or estoppel. However, in the previously mentioned case of *United States Fidelity & Guaranty Co. v. Rice*,⁵¹ the Mississippi Supreme Court, by way of dictum, indicated that a director of a corporation could not recover funds paid for a security issued by said corporation by bringing an action against the surety.

Section 410 (a) of the Uniform Securities Act provides that the "person buying the security" may bring an action to recover the consideration paid for a security. It can be assumed that "person buying the security" under the Uniform Act is the same as "purchaser" under the Mississippi Act. The only substantial difference with regard to who can bring an action under the respective statutes is that the Uniform Act in section 410 (d) specifically provides that the cause of action under that statute will survive the death of any person "who might have

⁴⁷Gales v. Weldon, 282 S.W.2d 522, 527 (Mo. 1955).

⁴⁸328 U.S. 293 (1946).

⁴⁹SEC v. W.J. Howey Co., 328 U.S. 293, 298-99, 301 (1946).

⁵⁰1 CCH BLUE SKY L. REP. ¶ 1651 (1954).

⁵¹241 Miss. 307, 130 So. 2d 924 (1961). See also p. 609 *supra*.

been a plaintiff or defendant.”⁵² This provision is known as the “survivability clause,” and the Mississippi Act has no comparable provision.

Thus, under the Mississippi Act any “purchaser” of a security may bring an action for recovery pursuant to sections 5374 and 5371. The purchaser’s right to such actions, however, is limited by the extent to which he has actively participated in the enterprise which issued the security. This limitation may take the form of *pari delicto* or estoppel or may be found in the fact that the issuance of the security is excused from the state Blue Sky Law as being merely a joint venture interest. The Mississippi Supreme Court has not made any specific pronouncements on the application of *pari delicto*, estoppel, or joint venture, but it has hinted that it will follow the general notion that a purchaser will not be allowed to maintain an action against an issuer of security when the purchaser has participated actively in the affairs of the issuer.⁵³

The use of the theories of *pari delicto*, estoppel, and joint interest to insure that a purchaser does not take advantage of his own misconduct is justified. But query whether the Tennessee court was justified in dismissing an action by a purchaser of illegally issued securities solely on the basis of his activities in the issuing company *after* the purchase of the securities.⁵⁴ It would seem that the issuance of the security is the critical transaction and that liability for illegally issued securities should not be overcome by subsequent participation by the purchaser in the issuing company.

As previously noted, the exemptions under the Mississippi Blue Sky Law confine its application to certain types of companies, most of which are relatively small and unsophisticated. Litigation in other jurisdictions indicates that the issues of *pari delicto*, estoppel, and joint venture permeate most cases concerning the issuance of securities

⁵²Concerning this survivability clause, the Official Code Commentary to section 410(d) of the Uniform Securities Act is as follows:

This subsection is designed to codify the majority view of the few cases which have ruled on the question of survivability under the state and federal securities statutes Although the question whether a statutory cause of action is assignable involves much the same considerations as whether it survives the death of either party, that question is left to the general law, whether decisional or under the general assignment statutes which exist in some states. 1 CCH BLUE SKY L. REP. ¶ 4940 (1971).

⁵³United States Fid. & Guar. Co. v. Rice, 241 Miss. 307, 130 So. 2d 924 (1961).

⁵⁴See Tucker v. McDell’s, Inc., 50 Tenn. App. 62, 359 S.W.2d 597 (Tenn. Ct. App. 1961).

by such companies. This leads one to believe that the emergence of these issues in civil actions under the Mississippi Blue Sky Law is inevitable. When the Mississippi Supreme Court faces the issue of the amount of participation in an issuer's affairs necessary to foreclose the civil liability provisions of the Mississippi Act, the purchaser's participation should be considered as of the time of the sale of the security. Also, the survivability provision in section 410(d) of the Uniform Securities Act would be an excellent addition to the Mississippi Act. Even in the absence of an express provision, the majority view in favor of survivability would be an equitable rule for the Mississippi Supreme Court to adopt if faced with such an issue. Finally, the purchaser who has actual knowledge of the illegality of the sale of the security should not be barred from an action under the Blue Sky Law, if said purchaser did not actively participate in the affairs of the issuer. To hold otherwise would allow an issuer to escape liability by merely informing each prospective purchaser that the security offered has not been registered under the state Blue Sky Law.

C. Persons Liable under the Mississippi Act

Section 5374(b) of the Mississippi Act provides that the purchaser of a security issued in violation of any provision of the Mississippi Act is "entitled to recover *from the seller* in an action at law . . . the full amount paid for such security, with interest from the date of purchase" (emphasis added). Section 5371 provides that a purchaser "shall have the right to bring suit upon the bond provided for by section 6 [section 5365]" for the purchase price, interest, and attorney's fees when the sale of a security is induced by misrepresentation of a material fact. Thus, both of the civil liability provisions of the Mississippi Act are narrowly drawn with regard to persons liable thereunder. Mississippi is one of the few states limiting actions for statutory rescission to those against the "seller."⁵⁵ This is contrasted with section 410(b) of the Uniform Securities Act which gives a detailed listing of the persons who can be liable thereunder as follows:

Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the non-seller who is so

⁵⁵See 3 L. Loss, *supra* note 1, at 1637.

liable sustains the burden of proof that he did not know, and in [the] exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.⁵⁶

The purpose of this section will be to analyze the relevant Mississippi cases in order to construct a general outline of the persons liable under the Mississippi Act. After the Mississippi cases will be a discussion of cases from other jurisdictions to give a more complete picture of persons generally liable under Blue Sky Laws. It is important to keep in mind that section 5371 allows an action upon the bond posted in accordance with section 5365, without mentioning the liability of specific persons, while the statutory rescission provision (section 5374 (b)) allows an action against the "seller." This distinction is especially important when noting that the section 5371 is applicable only if the issuer has complied with the Mississippi Act; and where the allegation of fraud is directed toward an issuer which has not complied with the Mississippi Act, the plaintiff must rely upon a common law action or upon the statutory rescission provision.⁵⁷ As will be subsequently noted in some detail, inability to come within section 5371 is significant because it is the only provision allowing the plaintiff to recover attorney's fees.⁵⁸

1. The Mississippi Cases

The 1933 case of *White v. Stewart*⁵⁹ presents a factual situation which crystalizes the rules governing which persons are liable under the Mississippi Act. In this case, the plaintiff purchased 200 shares of stock in Baird's Television, Incorporated, a foreign corporation, from defendants who were doing business as brokers in Jackson, Mississippi. This was an ordinary purchase of securities of a foreign corporation from a local broker, except that the securities were not registered under the Mississippi Act. After discovering that this stock had little, if any, market value, the plaintiff brought an action against the brokers for the cash which had been paid for the stock and for a return of three promissory notes which had also been given as consideration for the stock. The plaintiff based her action on the Mississippi Act and the premise that she was induced to purchase the stock by means of a

⁵⁶UNIFORM SECURITIES ACT § 410 (b).

⁵⁷See *White v. Stewart*, 166 Miss. 694, 145 So. 747 (1933).

⁵⁸See p. 626 *infra*.

⁵⁹166 Miss. 694, 145 So. 747 (1933).

fraudulent representation. The lower court held in favor of the plaintiff, but on appeal the Supreme Court of Mississippi reversed and dismissed the bill.

The court held that the predecessor of section 5371 was not controlling because it applied only to suits against investment companies which had complied with the Mississippi Act. Since the issuer, Baird's Television, Incorporated had not complied with the statute and the defendant brokers were not an "investment company," the court held that section 5371 was not of any assistance to plaintiff. The court noted that Baird's Television, Incorporated also was not an "investment company" under the Mississippi Act because it had not sold nor offered for sale any of its stocks in Mississippi. The court stated:

[T]he appellants [brokers] sold stock of which they were the absolute owners, issued by a corporation not shown to be an investment company, within the meaning of the statute. Such sales are not prohibited by the Blue Sky Law.⁶⁰

The court also dismissed the common law claim, holding that the alleged fraudulent statements made by the defendants' agent in the sale of the stock were merely expressions of opinion, and, in any event, that the written contract for the sale of the stock excluded any oral agreement made by the plaintiff relative to the stock.

In 1935, the Mississippi Supreme Court in the case of *Mississippi Power Co. v. May*⁶¹ encountered a case similar to *White v. Stewart*. In the *May* case the plaintiff had paid \$5,000.00 for defendant's preferred stock. The plaintiff's action for recovery of the purchase price plus interest and attorney's fees was grounded on two counts: one under common law fraud and deceit and the second under the Blue Sky Law. There was no proof that the defendant corporation had qualified and given bond under the Mississippi Act. The jury returned a verdict in favor of the plaintiff in the amount of \$6,500.00. On appeal, the Mississippi Supreme Court reversed and remanded, holding that it appeared that the jury had held for the plaintiff on the basis of the second count which stated a cause of action under the Blue Sky Law, and since there was no proof that the defendant had complied with the Blue Sky Law, there was no cause of action thereunder.⁶² The court cited the *White* case for this proposition and stated:

⁶⁰*Id.* at 702, 145 So. at 749.

⁶¹173 Miss. 580, 161 So. 149 (1935).

⁶²*Id.* at 592-93, 161 So. at 756 (suggestion of error).

The Blue Sky Law . . . is materially different from the common-law action for fraud and deceit, or the equitable action of rescission. Under the Blue Sky Law, any material representation made by a selling agent, whether in the scope of his authority or not, where such representation is false, gives the buyer of stock the right to bring suit for rescission, and said act also provides for attorney's fees.⁶³

On suggestion of error the plaintiff contended that if defendant had not complied with the Blue Sky Law, the sale of preferred stock to plaintiff was void, thus entitling plaintiff to recover the purchase price with interest, but without attorney's fees. The court dismissed this contention, holding that it must review the case on the same theory on which it was presented to the jury.⁶⁴ The court stated:

We held, and now reaffirm our intention to hold, that a plaintiff cannot recover upon the Blue Sky Law unless the selling company has complied therewith, and this must be affirmatively proved. . . . We leave undecided . . . and until those questions shall be definitely presented on full argument, whether an intending purchaser must inquire or whether he need not inquire as to the seller's compliance with the Blue Sky Law; also whether a sale, by one who should comply, but is shown not to have done so, is void, or voidable or valid.⁶⁵

The case of *Mississippi Power Co. v. Bennett*⁶⁶ is almost identical to the *May* case, and apparently involved the same selling practice by the Mississippi Power Company which had been attacked in the *May* case. As in the *May* case, the cause of action in *Bennett* was founded upon two counts: one based on common law fraud and the other based on the Mississippi Blue Sky Law. However, in *Bennett* the Mississippi Supreme Court affirmed the verdict in favor of the plaintiff for recovery of the purchase price. The court acknowledged the existence of the second count which was based on the Blue Sky Law, but did not give a meaningful analysis of the law's relevance to the plaintiff's recovery. The only indication as to the applicability of the Blue Sky Law in *Bennett* is found in the dissent where it was stated that the majority had "eliminated from their consideration the count under the Blue Sky Law."⁶⁷ The reason for this elimination is a mystery.

⁶³*Id.* at 591-92 (opinion of court).

⁶⁴*Id.* at 593, 161 So. at 756.

⁶⁵*Id.*

⁶⁶173 Miss. 109, 161 So. 301 (1935).

⁶⁷*Id.* at 137, 161 So. at 310 (dissenting opinion).

The difficulties which the court had in *White* and *May* are mainly attributable to the absence of a statutory provision making the sale of unregistered securities void or voidable. Under section 5374 (b) of the present act, "[e]very sale or contract of sale of any security made in violation of any provision of [the Mississippi Blue Sky Law] is voidable at the election of the purchaser." If this provision had been in the statute at the time of the *White* and *May* cases, the court would have had no problem in allowing the plaintiffs to recover the purchase prices with interest. Even in the absence of such a provision, the court could have held that the sale of unregistered securities was unlawful and that an unlawful sale is at least voidable.⁶⁸ The transactions in *White* and *May* are precisely the type of transactions that Blue Sky Laws were meant to cover. To allow the seller to escape liability because the securities had *not* been registered is irony of the highest order and is contrary to the very purpose of the statute. The court in *White* found significance in the fact that the defendant brokers were "absolute owners" of the stock which the plaintiff purchased. If this were the determining factor, all "firm commitment" underwriting would be immune from the Mississippi Act.

The holding in *White* and *May* that the predecessor of section 5371 was limited to situations in which the issuer had complied with the Mississippi Blue Sky Law is inescapable in view of the wording of the section; but this should not have prevented the court from holding that the sales were unlawful, and therefore voidable, because the securities had not been registered. Fortunately, the present statute would allow an action under section 5374 (b) for the sale of unregistered securities, and the fact that section 5371 is limited to registered securities is not a serious handicap as it was in the days of *White* and *May*.

As stated previously, section 5371 allows an action "upon the bond" posted by an investment company when the sale of a security is induced by the misrepresentation of a material fact. Does this mean misrepresentation only by the "seller"? Language in the case of *Bankers' Mortgage Co. v. McMullan*⁶⁹ indicates that the misrepresentation necessary to permit an action under section 5371 can be made "by an officer, agent, employee, promoter, or trustee of an investment company in effecting a sale of its stocks, bonds, or other securities."⁷⁰ This connotes, therefore, that while section 5374 (b) is limited to actions

⁶⁸Cf. *Hartford Fire Ins. Co. v. Knight*, 146 Miss. 862, 111 So. 748 (1927).

⁶⁹165 Miss. 382, 141 So. 331 (1932).

⁷⁰*Id.* at 396, 141 So. at 334.

against the "seller," section 5371 is not so limited. That section 5371 is not limited to misrepresentations by the "seller" is justified because of the distinct possibility that a purchaser could be induced to buy a security by misrepresentations made by someone other than the actual seller of the security.

2. *Guynn v. Shulters*

Probably the most significant case on civil liability under the Mississippi Blue Sky Law is the 1955 case of *Guynn v. Shulters*.⁷¹ This case is important because it involves an excellent example of the type of investment with which the Mississippi Act should be concerned. Because this case so readily lends itself to analysis from a policy standpoint, it will be presented in considerable detail.

The *Guynn* case involved six separate suits by subscribers of the capital stock of Barton's, Incorporated, an Alabama corporation. The facts showed that on January 27, 1950, a Mrs. Barton sold a chicken farm and business which she operated in Grand Bay, Alabama, to her husband, E. S. Barton, and Charles A. Guynn. In April, 1950, Barton and Guynn decided to explore the possibility of incorporating and enlarging their chicken business. Guynn, who was employed in Pascagoula, Mississippi, contacted some of his fellow employees about investing in his chicken business. Several of the prospective investors met at Barton's residence in Grand Bay on April 27, 1950, to discuss the desirability of purchasing stock and organizing the corporation. On May 2, 1950, another meeting was held at Barton's residence and several persons, including most of the plaintiffs, signed a "Subscription List" which obligated them to purchase stock at \$100.00 per share in the corporation to be created.

The business was incorporated in Alabama on May 5, 1950, with the domicile in Grand Bay, Alabama. The capital structure was 250 shares of common stock at \$100.00 per share for a total of \$25,000.00. It was decided that Barton and Guynn would transfer the chicken business to the corporation for an agreed price of \$8,100.00 and that they would each receive forty shares of stock in exchange. The auditor of the business, Watson, received one share, so that a total of eighty-one shares was issued for the property transferred to the corporation. All of the plaintiffs paid for their stock *after* the incorporation of May 5, 1950, and the court indicated that in addition to the eight plaintiffs herein at least eight to ten other persons subscribed for stock in the corporation. Evidence presented in the trial showed that plaintiff's participated in

⁷¹223 Miss. 232, 78 So. 2d 114 (1955).

several shareholders meetings and that some of the plaintiffs served the corporation in various capacities.

In July, 1950 it was reported that a disease known as pullorum had infected the chickens causing the death of about 14,000 of them. The business became a losing venture and the investors instituted suits to recover the price paid for the stock with interest from the dates of purchase. In total, there were six different suits with eight plaintiffs in actions against the corporation, Mr. and Mrs. Barton, and Guynn. One suit, instituted by three plaintiffs on October 13, 1950, claimed that the stock had been issued in violation of the Mississippi and Alabama Blue Sky Laws and that the purchase of the stock had been induced by material false representations. The other five suits were filed in May 1951, and sought recovery of the purchase price on the grounds that the stock was issued in violation of the Mississippi and Alabama Blue Sky Laws. These five suits made no claim of false representations. The defendants admitted that neither they nor Barton's, Incorporated had complied with the Blue Sky Law of Alabama or Mississippi. Judgments in favor of the plaintiffs were rendered in all six cases and defendants appealed to the Mississippi Supreme Court.

Initially, the court had to determine whether Alabama or Mississippi law would apply, as the plaintiffs had alleged a violation of the Blue Sky Laws of both states. The court held that Alabama's law would not apply because the purchases of the stock were made in Mississippi. No case was cited for this proposition and the court did not discuss the significance, if any, of the fact that the "Subscription List" had been signed in Alabama, that the organizational meetings had been held in Alabama, and that the business was located and incorporated in Alabama. As will be subsequently noted in some detail, the court looked primarily to the signing of the "Subscription List" and not to the actual purchase of the stock to determine liability under the Mississippi Blue Sky Law. It is therefore strange that the court did not even mention the "Subscription List" with regard to the choice of law.⁷²

From the prior description herein of the coverage of the Mississippi Blue Sky Law, one would assume that it surely applied to the sale of securities in the *Guynn* case. Approximately eighteen persons had actually subscribed to the stock of this corporation, and it can be easily surmised that the number of offers was well in excess of eighteen.

⁷²As a result of the recent decision of *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968), in which the Mississippi Supreme Court adopted the modern choice of law doctrine, the analysis of the applicability of the Alabama law might be different if a similar case were to arise.

There is no doubt that the common stock which the corporation issued came within the definition of "security" and there was no specific exemption in the Mississippi Act. Yet, the Mississippi Supreme Court reversed all six cases and held that there was no liability under the Mississippi Blue Sky Law. Tracing the court's reasoning is instructive.

The court gave several reasons why the Mississippi Blue Sky Law would not apply, any one of which standing alone, would have been sufficient to rule in favor of the defendants. First, the court held that "preorganization stock subscribers, under the circumstances here disclosed, have no right of action for failure of the corporation, or one who induces them to purchase stock, to comply with the Blue Sky Laws of Mississippi."⁷³ The court acknowledged a conflict of authority on this point and ruled that because the corporation was not in existence at the time the subscriptions were solicited, there was no way to comply with the Mississippi Blue Sky Law. The problem with this reasoning is that it looks to the time of subscription and ignores the actual sale and issuance of the stock. To hold that a promoter can solicit and obtain subscriptions to stock of a corporation to be created in the future should not mean that the subsequently formed corporation can issue stock in violation of the Blue Sky Law. To hold otherwise allows evasion of the Blue Sky Law by simply finalizing all stock subscriptions prior to incorporation and issuing the stock in accordance with the subscriptions. This is exactly what the *Guynn* decision appears to condone. It is respectfully submitted that the Mississippi Supreme Court was wrong on this point. It should have looked to the actual sale to determine if the stock was issued in violation of the Blue Sky Law.

With regard to the liability of the corporation itself, the court again focused on the time of subscription as opposed to the time of the actual sale. The court stated:

It is at once evident that Barton's, Inc., not yet in existence, could not have complied with the . . . requirements [of the Blue Sky Law] as a prerequisite to the preorganization negotiations to subscribe for future stock of the corporation when and if formed.⁷⁴

This statement is absolutely correct, but what about complying with the Blue Sky Law prior to issuance of the securities? This is the crucial question. The court stated further:

⁷³*Guynn v. Shulters*, 223 Miss. 232, 247, 78 So. 2d 114, 119 (1955).

⁷⁴*Id.* at 249, 78 So. 2d at 120.

We do not think that [the Blue Sky Law] was intended to apply to such a situation. It was as much the duty of one subscriber as that of another to see that the corporation complied with the law. However, had the corporation, or appellants, complied with the Blue Sky Law such compliance would have occurred after complainants had agreed to subscribe to the stock. There had been no violation of law, or failure to comply therewith, when complainants subscribed to the stock.⁷⁵

The court dug an even deeper hole for itself with its selection of quotations from the authority on which it relied. It quoted from *Watkins v. Public Service Life*,⁷⁶ a Washington case involving a claim for compensation for services rendered in the sale of pre-organizational stock subscriptions. The defense was that plaintiff had not complied with the Washington Securities Act when he rendered the services. The Mississippi Supreme Court quoted from the opinion of the Washington Supreme Court, to wit: "His services were all rendered prior to the time that the prospective corporation could legally issue securities, *the sale and disposition of which would be regulated by the Securities Act.*"⁷⁷ This statement clearly shows that the Washington Supreme Court would apply the Blue Sky Law to the sale and issuance of the securities, notwithstanding the fact that the issuance was pursuant to a preincorporation subscription. Similarly, the Mississippi Supreme Court states: "Subscriptions to stock are to be distinguished from sales of stock by a corporation,"⁷⁸ thus expressly acknowledging the very point which the court chose to otherwise ignore.

As a final reason for holding that the Blue Sky Law was not applicable, the court held that defendants were not agents or dealers under the Mississippi Act and that they were therefore not liable thereunder. The problem with this is that the Mississippi Act which was in force at the time of the *Guynn* case required that certain securities be registered before issuance, without reference to whether or not the dealer or person selling the security was registered. In other words, an unregistered security sold by a registered dealer would have been unlawful, and vice-versa. So the fact that defendants were not dealers under the Mississippi Act did not cure the defect of the unregistered securities.

⁷⁵*Id.* at 250-51, 78 So. 2d at 120.

⁷⁶188 Wash. 280, 62 P.2d 465 (1936).

⁷⁷*Guynn v. Shulters*, 223 Miss. 232, 247-48, 78 So. 2d 114, 119 (1955) (emphasis added).

⁷⁸*Id.* at 248, 78 So. 2d at 119, quoting 14 FLETCHER CYCLOPEDIA CORPORATIONS § 6747, at 192.

3. The *Guynn* Situation under Present Mississippi Law

It is instructive to apply the civil liabilities provision of the present Mississippi Blue Sky Law to the factual situation in the *Guynn* case. Under section 5361 (b) Barton's, Incorporated would be a "foreign investment company." Section 5362 provides that every foreign investment company must register its securities with the secretary of state before selling or offering for sale such securities in the state of Mississippi. Section 5374 (b) provides that the sale of any security made in violation of the Mississippi Act is voidable at the election of the purchaser and that said purchaser can recover the price paid from the "seller." Perusal of sections 5384 and 5384.5 shows that there is no apparent exemption for the securities issued by Barton's, Incorporated. Therefore, we have the sale of an unregistered security by a foreign investment company in violation of the Mississippi Act.

What should an attorney do when faced with the organization of a corporation similar to the one involved in the *Guynn* case? The first step should be to seek an exemption so that the expenses of compliance can be avoided. Section 5384.5 (i) exempts the offer and sale of securities by a domestic investment company when there are ten or fewer shareholders after the sale is completed and where neither the offer, sale or authorized capital exceeds \$50,000.00. Discounting the conflict of laws questions in *Guynn* and hypothecating Barton's, Incorporated as a domestic investment company, this exemption would have been ideal to allow the Bartons and *Guynn* to raise the necessary capital without having to comply with the Mississippi Blue Sky Law. To be on the safe side, the attorney should obtain a certificate of exemption from the secretary of state. The issuance of a formal certificate of exemption by the secretary of state is *prima facie* evidence that the securities are exempted from the Mississippi Act.⁷⁹

4. Cases from Other Jurisdictions

As stated previously, most states do not limit recovery under their Blue Sky Law to actions against the "seller" of the security as Mississippi does. A brief survey of cases from other jurisdictions is useful.

⁷⁹The author hopes that his criticism of the *Guynn* decision will be acceptable. Evidently, the attorney for the plaintiffs in the *Guynn* case was quite upset with the decision rendered by the Mississippi Supreme Court. The brief which he submitted in a suggestion of error was stricken from the files because of disrespect to the court. The Mississippi Supreme Court stated: "Language such as that used by the attorney in his suggestion of error and brief serve no purpose; it is of no aid to the Court and of no service to the clients in whose behalf it is used." *Guynn v. Shulters*, 223 Miss. 232, 262, 78 So. 2d 793 (1955) (suggestion of error overruled).

With regard to the liability of a stockbroker in a normal stock transaction, some courts have held that the broker is not liable for selling an unregistered security,⁸⁰ while other courts have held that the broker is liable in such cases.⁸¹ Usually, where no liability is found, the reason is that the broker was merely acting as an agent for the purchaser.⁸² Frequently the reason for broker liability is that the broker was a decisive factor in the sale of an unregistered security.⁸³ The essential difference seems to be that if the broker initiates the sale of an unregistered security, he may be liable to the purchaser; but, if the purchaser initiates the transaction and the broker merely carries out the purchaser's request, the broker will not be liable.⁸⁴ In some jurisdictions civil liability can be found against a person who has done *any* act in furtherance of a sale of an unauthorized security.⁸⁵

Officers and directors of a corporation can be liable under a Blue Sky Law if they participate in the sale of an unauthorized stock or if they participate in making false and fraudulent misrepresentations to induce others to purchase stock.⁸⁶ Officers and directors are not personally liable simply because they serve in their respective capacities, but this fact does not relieve officers and directors of pre-existing responsibilities, the violation of which may result in personal liability.⁸⁷ In Mississippi, officers and directors would be liable under section 5374(b) only if they actually sold the stock, while liability under section 5371 would arise if the corporation had posted bond under section 5365 and if the officer or director induced the sale of stock through a misrepresentation.

In California, liability for false and misleading statements is generally limited to a person who buys or sells a security, although in some instances this liability extends to other specifically identified

⁸⁰*E.g.*, *Fine v. Bradford*, 190 Ga. App. 380, 136 S.E.2d 147 (1964).

⁸¹*E.g.*, *Gonia v. E.I. Hagen Co.*, 251 Ore. 1, 443 P.2d 634 (1968).

⁸²*E.g.*, *Fine v. Bradford*, 190 Ga. App. 380, 136 S.E.2d 147 (1964).

⁸³*E.g.*, *Gonia v. E.I. Hagen Co.*, 251 Ore. 1, 443 P.2d 634 (1968).

⁸⁴This distinction is explained in 1 CCH BLUE SKY L. REP. ¶ 3611 (1954):

A dealer or broker who, in the course of business carried on by him as a dealer or broker, sells stock which is not qualified or registered, is liable to the purchaser for the amount of the purchase price in a suit for rescission of the sale. However, if the purchaser has employed the dealer or broker to act as agent for him in the purchase of the stock, the dealer or broker cannot be held liable, since in such situation he was not the "seller" of the securities. Dealers are liable for the acts of their licensed salesmen.

⁸⁵*See* Annot., 59 A.L.R.2d 1030 (1958).

⁸⁶1 CCH BLUE SKY L. REP. ¶ 3615 (1954).

⁸⁷*See* *Davis v. Walker*, 104 N.W.2d 479 (Neb. 1960).

persons.⁸⁸ These collateral persons who may be liable do not have the same standard of care as the principal actor.⁸⁹ The Michigan courts have held that anyone who actively assists in negotiations for the sale of securities in violation of the Blue Sky Law is liable to the purchaser.⁹⁰ The Supreme Court of Oregon recently held that a person who merely made a loan to a promoter was liable under the Blue Sky Law because he "participated" and "aided and abetted" in the sale of the stock.⁹¹

D. The Blue Sky Law as a Defense in Civil Actions

Several cases have arisen in Mississippi where violation of the Blue Sky Law was put forth by a defendant who was trying to escape liability on a promissory note given for securities. The court held that in Mississippi the violation of the Blue Sky Law does not constitute a defense in an action on a negotiable instrument in the hands of an innocent purchaser for value without notice.⁹²

The 1927 case of *Dixie Rubber Co. v. Catoe*⁹³ presents an example of using the Blue Sky Law for defense in a civil action. This case involved an action by Dixie Rubber Company, a Mississippi corporation domiciled in Tennessee, against one L. C. Cadenhead and his sureties on a bond posted by Cadenhead. Cadenhead had sold securities issued by the plaintiff corporation and retained \$44,000.00 of the proceeds therefrom as his commission of 25 percent. These securities were not registered under the Mississippi Blue Sky Law. Cadenhead soon realized that his contract with the plaintiff was void because the securities had not been registered. Accordingly, Cadenhead agreed to pay plaintiff \$52,129.60 and gave him a bond in this amount. Subsequently, Caden-

⁸⁸MARSH & VOLK, PRACTICE UNDER THE CALIFORNIA CORPORATE SECURITIES LAW OF 1968 450-51 (1968).

⁸⁹*Id.* at 451. Concerning this standard of care, the authors state:

The liability imposed upon these collateral persons solely by virtue of their status or relationship to the vender or purchaser of the security should be based upon actual knowledge of the false or misleading nature of the statement or upon knowledge of facts which gave the collateral person reasonable grounds to know that the statement was false or misleading, whether or not he in fact believed it to be so.

⁹⁰1 CCH BLUE SKY L. REP. ¶ 3621 (1954).

⁹¹*Adamson v. Lang*, 389 P.2d 39 (Ore. 1964).

⁹²*Gordin v. Bank of Forest*, 170 Miss. 56, 154 So. 341 (1934); *Tallahatchie Home Bank v. Aldridge*, 169 Miss. 597, 153 So. 818 (1934); *Riddle v. Tallahatchie Home Bank*, 160 Miss. 141, 133 So. 128 (1930); *First Nat'l Bank v. C.W. Leeton & Bros.*, 131 Miss. 324, 95 So. 445 (1923).

⁹³145 Miss. 342, 110 So. 670 (1927).

head refused to pay anything to the plaintiff, and a suit was instituted against Cadenhead and the sureties on the bond. The defendants claimed no liability because the securities were sold in violation of the Blue Sky Law.

The Supreme Court of Mississippi affirmed the lower court decision in favor of the defendants stating:

Having failed to get permits to sell its stock in Mississippi and Tennessee, under the laws of those states appellant had no right to sell its stock in those states. Therefore, under the laws of both Mississippi and Tennessee, appellant's contracts for the sale of its stock in those states were unlawful and void, and therefore unenforceable.⁹⁴

In the 1967 case of *Gulf Land & Development Co. v. McRaney*,⁹⁵ the Mississippi Supreme Court followed its ruling in the *Dixie Rubber Co.* case. The *McRaney* case involved a scheme where the Gulf Land Company was issuing its capital stock in exchange for mineral deeds on land in Mississippi. The stock had not been registered pursuant to the Mississippi Blue Sky Law. In an action to confirm title and cancel a mineral deed which had been given in exchange for this unregistered stock, the Mississippi Supreme Court granted the requested relief, holding that the transaction in which the mineral deed was obtained was "utterly void" and subject to collateral attack.

The *Dixie Rubber Co.* and *McRaney* cases illustrate the extent to which illegally issued stock can permeate matters collateral to actual sale. Cognizance of these interpretations will allow the attorney to be aware of any transaction which may be tainted by illegally issued securities. These cases also show that the Mississippi Supreme Court will declare void all collateral matters of an illegal stock sale, limited only by the protection given to an innocent purchaser for value without notice.

E. Statute of Limitation

Section 5374 (b) provides that an action thereunder must be commenced within two years after the purchaser discovered or should have discovered that the security was issued in violation of some provision of the Mississippi Act or that the sale of the security was induced by misrepresentation of a material fact. The other civil liability provision, section 5371, does not make reference to a statute of limitation, but

⁹⁴*Id.* at 347-48, 110 So. at 671.

⁹⁵197 So. 2d 212 (Miss. 1967).

since it allows actions where the sale is induced by misrepresentation and since the statute of limitation provision in 5374(b) makes specific reference to such actions, it can be surmised that the statute of limitations is the same under section 5371 and section 5374(b).

The statute of limitation under the Mississippi Blue Sky Law is unique because it runs from the date that the buyer discovered or should have discovered the violation or misrepresentation; whereas, the statutes of limitation in most other states run from the date of the illegal sale or contract.⁹⁶ Also, fifteen of the eighteen states which have an express voidability provision, as Mississippi has, have an additional provision that a rescission offer will reduce the normal period of the statute of limitations.⁹⁷ Mississippi is one of the three states with a voidability provision and no reduction in the period of statute of limitations upon a rescission offer by the seller of the security.⁹⁸ This situation has been summarized by Professor Loss as follows:

The three states with effective voidability provisions unaccompanied by rescission offer mechanisms are Arizona, Louisiana, and Mississippi Arizona and Mississippi are two of the three states . . . whose statutes of limitations refer to discovery of the violation In those three states the person liable may, of course, reduce the limitation period by notifying the other party of the violation; but obviously he cannot do this and also let sleeping dogs lie.⁹⁹

Section 410(e) of the Uniform Securities Act provides that no action thereunder can be commenced more than two years "after the contract of sale." It also contains a rescission offer provision to the effect that no action can be commenced if the buyer of a security has received an offer to refund the purchase price plus interest less income derived from the security and has failed to accept the offer within thirty days of receipt. It has been held in a jurisdiction which has adopted the Uniform Securities Act that fraudulent concealment of an untrue statement does not toll the statute of limitations.¹⁰⁰

Under the Mississippi Blue Sky Law, civil liability can arise upon the sale of a security in two basic ways: (1) by a sale made in violation of some provision of the Mississippi Act (section 5374(b)); or (2) by a sale induced through the misrepresentation of a material fact (section

⁹⁶See 3 L. Loss, *supra* note 1, at 1640.

⁹⁷6 L. Loss, *supra* note 1, at 3792 (Supp. 1969).

⁹⁸*Id.*

⁹⁹*Id.* at 3793.

¹⁰⁰*Martin v. Pacific Ins. Co.*, 431 S.W.2d 239 (Ark. 1968).

5371). There is no readily observable reason why the statute of limitations for these two sections must be the same. For an action based on the sale in violation of some provision of the Act, the statute of limitations should be two years from the contract of sale, and for the action based on misrepresentation of a material fact, the statute of limitation should be two years from the date the purchaser discovered or should have discovered the existence of the misrepresentation. In the latter case, a provision for a rescission offer similar to the one found in section 410(e) of the Uniform Securities Act would be appropriate.

These changes in the Mississippi Act would make it more equitable. Under the present Act a seller of a security could make some technical violation of the Act and find himself faced with a statutory rescission action ten or fifteen years after the sale of the security. By making the statute of limitation two years from the contract of sale in such cases, the consequences of the registration process become more predictable, thus aiding the business planner without unduly compromising the rights of the investing public. But why should such certainty be encouraged in the case of a sale of a security by misrepresentation? Here the possible harm to the investing public is greater, and the activities of the seller usually more pernicious. In the misrepresentation cases, therefore, the statute should run from the discovery of the misrepresentation, but this should be limited by a rescission offer provision. Otherwise, a purchaser upon discovery of the misrepresentation could wait for almost two years to file his action, making such filing dependent upon the rise or fall in the value of his security.

It should be noted that the statute of limitation under a Blue Sky Law does not affect the statute of limitation for common law actions such as fraud, deceit, and rescission.¹⁰¹

F. Amount Recoverable

Under section 5371 in an action upon the bond posted by a seller in compliance with the Mississippi Act, the plaintiff may recover "the money paid, or the actual value of the property given, or the labor performed in exchange for such stocks, bonds or other securities, with legal interest from the date of payment or the performance of the service, or the transfer of the property, and reasonable attorney's fee." In other words, the plaintiff may recover the purchase price plus interest and attorney's fees. However, it must be remembered that section 5371 is limited to an action "upon the bond provided for by section 5365," which means that the issuer or dealer must have complied

¹⁰¹Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967).

with the Mississippi Blue Sky Law. The statute provides further that "no recoveries upon such bond shall ever exceed the full amount of same, and upon suits being filed in excess of the amount of the bond the secretary of state may require a new bond." Therefore, the amount recoverable under section 5371 is the purchase price plus interest and attorney's fees, not to exceed the amount of the bond posted under section 5365.¹⁰²

Under section 5374 (b) the purchaser may recover purchase price plus interest less any income received from the security. One obvious difference between the amounts recoverable under sections 5371 and 5374 (b) is that there is no provision for recovery of attorney's fees under section 5374 (b). Two other differences are that section 5371 is limited to the amount of the bond while section 5374 (b) has no such limitation, and section 5374 (b) expressly provides for reducing the amount recoverable by the income received on the security while section 5371 has no such reduction.

Under section 410 (a) of the Uniform Securities Act, the purchaser may recover

the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.¹⁰³

The provision on amount recoverable in section 410(a) of the Uniform Securities Act is clearly superior to the provisions in the Mississippi Act. The aforementioned inconsistencies between sections 5371 and 5374 (b) of the Mississippi Act make it confusing and tricky. The absence of a provision for attorney's fees in section 5374 (b) and the limitation to the amount of the bond in section 5371 are significant deficiencies in the Mississippi Act.

G. Section 5380

Section 5380 is the general anti-fraud provision of the Mississippi Blue Sky Law. Prior to 1958, Mississippi had no such provision.

¹⁰²*But see* United States Fid. & Guar. Co. v. Rice, 241 Miss. 307, 130 So. 2d 924 (1961).

¹⁰³UNIFORM SECURITIES ACT § 410 (a).

Section 5380 (a) makes it unlawful to make a false statement in any document or financial statement which must be filed under the Mississippi Act. Section 5380(b) makes it unlawful to employ any device or scheme or engage in any practice or course of business which would defraud a "purchaser, seller, or investor." Section 5380 (b) also makes unlawful the representation that filing a registration statement with the secretary of state means that the merits of the security have been approved or recommended. Under section 5380 (c) it is unlawful to sell or offer for sale any optional preorganizational incentive security during the period and one year after said period during which a certificate of authority granted to the issuer is outstanding.

Section 5380 does not specify a remedy for the fraudulent practices which it condemns. Therefore, a purchaser who has been defrauded within the provisions of section 5380 would have a cause of action under section 5374 (b), which, it will be remembered, has no provision for recovery of attorney's fees. The ridiculous result of this is that if the issuer has complied with the Mississippi Blue Sky Law, a purchaser who has been defrauded can recover the purchase price, interest, and attorney's fees up to the amount of the bond posted, while if the issuer has not complied, the defrauded purchaser can recover only the purchase price and interest.

III. SUMMARY

The Mississippi Blue Sky Law has not changed significantly since 1942. The lack of cohesiveness in the civil liability provisions as shown in the foregoing discussion is indicative of the piecemeal manner in which the statute has been constructed. The inconsistencies in the decisions by the Mississippi Supreme Court in civil liability cases arising under this statute occur mainly because of the confusing organization of the civil liability provisions. The entire Mississippi Blue Sky Law badly needs an overhaul, and the proper action by the Mississippi legislature would be to completely wipe the slate clean and enact a new Blue Sky Law which is responsive to the present needs of securities regulation in the state of Mississippi. But it is questionable whether a verbatim acceptance of the Uniform Securities Act would be the proper answer to this need for legislative reform. Mississippi is still a relatively rural state with a comparatively unsophisticated investing public which requires stringent protection from unscrupulous corporate promoters. On the other hand, Mississippi is attempting to encourage industry to locate and expand within the state, and an unduly restrictive Blue Sky Law would hamper industrial growth.

The Uniform Securities Act is an excellent model for Mississippi to follow, but it should be molded to fit Mississippi's peculiar needs. This molding process, if done correctly, will take a considerable amount of time. In the interim, immediate action should be taken to change the civil liability provisions. It is submitted, therefore, that the Mississippi legislature enact as soon as possible the following provision to control civil liability under the Mississippi Blue Sky Law.

IV. SUGGESTED CIVIL LIABILITY SECTION FOR THE MISSISSIPPI BLUE SKY LAW

(1) Any person who

- (a) offers or sells a security in violation of any provision of this act or
- (b) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission,

is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per year from date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.

- (2) Every person who directly or indirectly controls a seller liable under subsection (1), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the non-seller who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several people so liable.

- (3) Any tender specified in this section may be made at any time before entry of judgment.
- (4) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.
- (5) For a cause of action arising under section 1 (a) of this statute, no person may sue more than two years after the contract of sale. For a cause of action arising under section 1 (b) of this statute, no person may sue more than two years after such person, by the exercise of ordinary care, should have discovered that the sale was made by means of an untrue statement of a material fact.
- (6) No person may sue under this statute
 - (a) if the buyer received a written offer, before suit and at a time when he owned the security to refund the consideration paid together with interest at six percent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty days of its receipt, or
 - (b) if the buyer received such an offer before suit and at a time when he did not own the security, unless he rejected the offer within thirty days of its receipt.
- (7) No person who has made or engaged in the performance of any contract in violation of any provision of this act or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.
- (8) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act or any rule or order hereunder is void.
- (9) Any person or persons having a cause of action under this act shall have the right to bring suit upon the bond provided for by section 5365. This right shall in no way limit or alter the amount recoverable under this act.
- (10) Section 5374 (b), with the exception of the first paragraph therein, and section 5371 are hereby repealed.

Comments

The proposed civil liability provisions are substantially taken from the Uniform Securities Act. The provisions are drafted so that they can be adopted immediately without disrupting the general scheme of

the Mississippi Blue Sky Law. If and when the Mississippi legislature decides to adopt the entire Uniform Securities Act, these civil liability provisions can be easily retailored to be placed back in their original context. Comments about the individual sections are as follows:

Section 1 — Section 1 (a) is a slightly changed version of section 410 (a) (1) of the Uniform Securities Act, and section 1 (b) is a verbatim copy of section 410 (a) (2) of the Uniform Act. Section 1 would allow recovery of consideration paid, plus six percent and reasonable attorneys' fees. This differs from the present Mississippi Act because it fixes a specific rate of interest and it would insure recovery of attorneys' fees for the type of actions presently covered by section 5374 (b) under which there is no provision for recovery of attorneys' fees. Also, it allows an action for damages if the purchaser no longer has the security, whereas the present Mississippi Act requires a tender of the security purchased.

Section 2 — This is a verbatim copy of section 410 (b) of the Uniform Securities Act. It differs significantly from the present Mississippi provisions because it contains a specific group of persons who can be liable. Under the present sections 5371 and 5374 (b), no reference is made to specify persons who may be liable.

Section 3 — This is a copy of section 410 (c) of the Uniform Securities Act.

Section 4 — This is a copy of section 410 (d) of the Uniform Securities Act and is commonly referenced as the "survivability clause." There is no such provision in the present civil liability sections under the Mississippi Act.

Section 5 — This is a provision combining the statutes of limitation in the Mississippi Blue Sky Law and the Uniform Securities Act. In the case where the cause of action is based on noncompliance with some procedural aspect of the Blue Sky Law, the statute of limitation will be two years from the contract of sale. However, where the cause of action is based on the misrepresentation of a material fact, the statute of limitation will be two years from the time the purchaser should have discovered this untrue fact.

Section 6 — This is a copy of part of section 410 (e) of the Uniform Securities Act. The provision gives the seller of a security an opportunity to shorten the statute of limitation by a rescission offer. There is no comparable provision under the present Mississippi Act.

Section 7 — This is a copy of section 410 (f) of the Uniform Securities Act.

Section 8—This is a copy of section 410 (g) of the Uniform Securities Act.

Section 9—This would replace section 5371 of the present Mississippi Act which allows actions against the bond posted under section 5365. However, under this proposed provision the purchaser would not be limited as he is under section 5371 to the amount of the bond which has been posted.

Section 10—This would merely repeal the two existing civil liability provisions under the Mississippi Blue Sky Law.

WRONGFUL DEATH¹ DAMAGES IN MISSISSIPPI

Semmes Luckett and Stephen L. Thomas***

Although the Supreme Court of Mississippi has stated that there is no mathematical formula for measuring damages in a wrongful death action,² every lawyer who represents a litigant in such a case is immediately confronted with the task of arriving at a figure representative of the net value of the decedent's life. Economists and statisticians, employing their charts and statistics for determining damages resulting from loss of earning power, are relied on in many cases. To properly utilize their services or subject their conclusions to a proper analysis through cross examination, it is essential that the attorney know the components of the formula which economists use in arriving at their conclusion.

This article will hopefully aid attorneys in their efforts to arrive at a representative figure. The areas to be explored in computing the value of a wrongful death claim include the following questions: In computing the net value of the decedent's life expectancy should the computations be based on the deceased's life expectancy or on his work expectancy? Should the deceased's earnings at the time of his death or his prospective earnings be used? Should decedent's personal living expenses be deducted? What damages other than lost earnings may be recovered? What rate of discount should be used to reduce the total award to its present value?

I. HISTORICAL DEVELOPMENT

The original wrongful death statute was Lord Campbell's Act³ passed by Parliament in 1846 to rectify the mischief caused by Lord Ellenborough's holding in the 1808 case of *Baker v. Bolton*⁴ that in a

*LL.B., University of Mississippi; Partner, Roberson, Luckett & Roberson; Clarksdale, Mississippi.

**Editorial Board, Mississippi Law Journal.

¹Miss. CODE ANN. § 1453 (1956).

²Catholic Diocese of Natchez—Jackson v. Jacquith, 224 So. 2d 216 (Miss. 1969); Boyd Constr. Co. v. Bilbro, 210 So. 2d 267 (Miss. 1968); Illinois Cent. R.R. v. Ragan, 252 Miss. 335, 173 So. 2d 433 (1965).

³The Fatal Accident Act, 9 & 10 Vict., c. 93 (1846).

⁴170 Eng. Rep. 1033 (1808).

civil court the death of a human being could not be complained of as an injury.⁵ The act created a cause of action for the benefit of the immediate family of a decedent whose death was caused by the wrongful act, neglect, or default of another. The recovery was limited to the named beneficiaries⁶ and divided among them as the jury by their verdict might direct, with damages measured by the loss suffered by those beneficiaries. Today every state has a wrongful death statute.⁷

Mississippi's original wrongful death statute⁸ was similar to Lord Campbell's Act. It created a cause of action for a death caused by the wrongful or negligent act or omission of another, if the decedent left "a widow or children, or both, or husband, or father."⁹ It directed that damages for the death of a father who was survived by a widow and children be distributed as the personal property of the decedent.¹⁰ The statute provided for "such damages as shall be fair and just, with reference to the injury resulting from such death to the person suing."¹¹

The statute was materially changed in 1896¹² when the measure of damages allowed was amended to read:

In such action the party or parties suing shall recover such damages as the jury may assess, taking into consideration all damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.¹³

Thus the statute was changed from the typical Lord Campbell's to an expanded type of statute under which damages for both the fatal injury and the death itself might be recovered in a single action.¹⁴

Since the adoption of chapter 86 of the Laws of 1896, Mississippi's wrongful death statute has given the beneficiaries¹⁵ thereunder the right to recover "all the damages of every kind." In the cases which

⁵*Id.*

⁶The beneficiaries were the wife, husband, child, and parents of the decedent.

⁷S. SPEISER, *RECOVERY FOR WRONGFUL DEATH*, app. A, 733-904 (1966) [hereinafter cited as SPEISER].

⁸MISS. CODE, ch. 61, art. 48 (1857).

⁹*Id.*

¹⁰MISS. CODE ANN. § 470 (1956) provides that such property be divided in equal shares.

¹¹MISS. CODE, ch. 61, art. 48 (1857).

¹²Ch. 86, § 1, [1896] Miss. Laws.

¹³*Id.*

¹⁴The amended statute allowed the beneficiaries to recover the damages of the decedent as well as their own damages.

¹⁵The beneficiaries under MISS. CODE ANN. § 1453 (1956) are the wife, husband, child, brother, sister, parent, or if none, the personal representative of the decedent.

followed shortly after the 1896 alteration, the Mississippi Supreme Court held that the beneficiaries could recover the present value of the decedent's own life expectancy.¹⁶ This position was repudiated in the 1924 case of *Belzoni Hardwood Co. v. Cinquimani*¹⁷ when the court stated that the present net value of the decedent's life expectancy was not recoverable as an element of damages in wrongful death actions.¹⁸ The court adhered to this view¹⁹ until the 1949 case of *Gordon v. Lee*²⁰ where the pre-*Cinquimani* rule was restored, i.e., that the parties suing for the death of the deceased could recover the net value of his life. The proposition that the right to recover "damages of every kind to the decedent" includes the right to recover the present net value of the life expectancy of the deceased has not been questioned since 1955,²¹ and is now a well established rule in this state.²²

II. WORK EXPECTANCY V. LIFE EXPECTANCY

The use of life expectancy tables is permitted in Mississippi unless the decedent had a pre-existing condition that would invalidate their showing.²³ Work expectancy tables, however, are not widely used even though they can be effective from the defendant's point of view in

¹⁶*New Deemer Mfg. Co. v. Alexander*, 122 Miss. 859, 85 So. 104 (1920) ("whatever sum the son might have recovered as the present value of his own expectancy"); *Gulf & S.I.R.R. v. Boone*, 120 Miss. 632, 82 So. 335 (1919) ("the present value of the decedent's own life expectancy"); *Mississippi Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735 (1909) ("the present value of the life expectancy of the deceased"); *Cumberland Tel. & Tel. Co. v. Anderson*, 89 Miss. 732, 41 So. 263 (1906) ("whatever sum the son might have recovered as the present value of his own expectancy").

¹⁷137 Miss. 72, 102 So. 470 (1924).

¹⁸*Id.* at 95, 102 So. at 474.

¹⁹*Avery v. Collins*, 171 Miss. 636, 157 So. 695 (1934); *Natchez Coca-Cola Bottling Co. v. Watson*, 160 Miss. 173, 133 So. 677 (1931); *Gulf Ref. Co. v. Miller*, 150 Miss. 68, 116 So. 295 (1928); *Yazoo & M.V.R.R. v. Lee*, 148 Miss. 809, 114 So. 866 (1927); *Yazoo & M.V.R.R. v. Barringer*, 138 Miss. 296, 103 So. 86 (1925).

²⁰208 Miss. 21, 43 So. 2d 665 (1949).

²¹*Bush v. Watkins*, 224 Miss. 238, 80 So. 2d 19 (1955) (dissenting opinion).

²²*See, e.g., Winstead v. Hall*, 251 Miss. 800, 171 So. 2d 354 (1965); *Ashcraft v. Alford*, 236 Miss. 25, 109 So. 2d 343 (1959); *Reed v. Eubanks*, 232 Miss. 27, 98 So. 2d 132 (1957); *Boroughs v. Oliver*, 226 Miss. 609, 85 So. 2d 191 (1956); *Bush v. Watkins*, 224 Miss. 238, 80 So. 2d 19 (1955); *Sandifer Oil Co. v. Dew*, 220 Miss. 609, 71 So. 2d 752 (1955); *Southern Pine Elec. Ass'n v. Denson*, 214 Miss. 397, 57 So. 2d 859 (1952).

²³*See Mississippi Cent. R.R. v. Robinson*, 106 Miss. 896, 64 So. 838 (1941); *Mississippi Cotton Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735 (1909); *Cumberland Tel. & Tel. Co. v. Anderson*, 89 Miss. 732, 41 So. 263 (1906); *Vicksburg R.R., Power & Mfg. Co. v. White*, 82 Miss. 468, 34 So. 331 (1903); *Illinois Cent. R.R. v. Crudup*, 63 Miss. 291 (1885).

lowering the total award since it is the decedent's future earning capacity that affects the beneficiaries' expectation of support.²⁴

In Mississippi there has been little express recognition of the distinction between the two expectancies.²⁵ In *Jeffreys v. Clark*²⁶ the appellants argued that the award was excessive because it was based on the decedant's life expectancy rather than his work expectancy. The court responded:

We do not know of any law which requires a man to quit working at the age of sixty-five or seventy, and many men are still working at the age of seventy and beyond. . . . There is no proof in this record that the deceased would have been forced to retire at age sixty-five.²⁷

The distinction was inferentially recognized in *Rayborn v. Freeman*²⁸ wherein the court said:

Insofar as the first error is concerned [that the award was excessive], the record discloses that appellant had a life expectancy of 10.1 years. The record is wholly silent as to what part of these years he would have been able to continue in his employment.²⁹

The above cases seem to indicate that the court, when presented with proper evidence, would consider the difference in determining the propriety of verdicts. The importance becomes apparent when one notes the differences, at various ages, between work and life expectancy.³⁰

²⁴SPEISER, *supra* note 7, § 3.14.

²⁵Work expectancy is the period of the decedent's life during which he could expect to earn a regular income. Life expectancy is the period of years the average person lives. See generally Immel, *Actuarial Tables and Damage Awards*, 19 OHIO ST. L.J. 240 (1958).

²⁶251 Miss. 129, 168 So. 2d 662 (1964).

²⁷*Id.* at 146, 168 So. 2d at 669.

²⁸209 So. 2d 193 (Miss. 1968).

²⁹*Id.* at 196.

³⁰8 U.S. DEPT. OF LABOR, MANPOWER REPORT 11 (July, 1963) provides the following statistics.

Average Number of Remaining Years of:

Age	Life	Work
20	49.6	42.6
25	45.0	37.9
30	40.4	33.2
35	35.7	28.6
40	31.2	24.1
45	26.9	19.7

It is not suggested that work expectancy tables should replace life expectancy tables, but they should be used to put life expectancy tables in the proper perspective.³¹

Neither table alone offers the jury the proper information needed to reach an equitable award. Work expectancy tables fail to consider that work in certain fields such as farming, law, or medicine can continue until death. They also fail to recognize that most people will have some income for life even though it may diminish after retirement. Life expectancy tables do not consider the fact that earning capacity generally decreases in a person's later years and that many people are forced to retire at certain ages.

In an attempt to prevent the defendant from convincing the jury that the plaintiff was "holding something back," the plaintiff should offer evidence as to both expectancies and provide the jury with a reasonable projection of income for the decedent's later years.³² The plaintiff should also remind the jury that the decedent, if forced to retire from the job he held at the time of his death because of age requirements, could have entered a new career.³³

III. SHOULD THE AWARD BE BASED ON THE DECEDENT'S WAGES AT THE TIME OF HIS DEATH OR ON HIS PROSPECTIVE EARNINGS?

When the family provider is killed, it is safe to assume in most instances that his financial contributions to his family would have continued in proportion to his earnings.³⁴ Because the value of one's life expectancy is measured by one's earnings, the question of how those earnings are calculated is important. Should they be based on the decedent's earnings at the time of death or on his prospective earnings? If based on prospective earnings what factors should be considered in such a determination? The answers to these questions are of great importance in valuing the life expectancy of the deceased.

<i>Age</i>	<i>Life</i>	<i>Work</i>
50	22.8	15.6
55	19.2	11.9
60	15.8	8.5
65	12.8	7.3
70	10.2	6.4
75	8.0	5.1

³¹See *Immel*, *supra* note 25, at 240.

³²*SPEISER*, *supra* note 7, § 3:14.

³³*Id.*

³⁴*Id.* § 3:15.

The rule generally followed in this country is that the award should be based on the decedent's future earnings.³⁵ This rule is based upon the fact that damages in a wrongful death case are awarded as a substitute for money which the decedent would have earned in the future had death not intervened.³⁶ The factors to be considered in determining prospective earning capacity are education,³⁷ vocation,³⁸ health,³⁹ manifestations of a vigorous willingness to work or an indifference toward work,⁴⁰ past earnings,⁴¹ and promotions.⁴²

In *Gulf and Ship Island Railroad Co. v. Boone*,⁴³ which involved the excessiveness of a verdict for the wrongful death of a young soldier, the argument was made that it was unjust to compute the value of the deceased's life expectancy on the basis of the wages he was earning at the time of his death and give no consideration to his prospective earnings. The court replied:

³⁵*Id.* § 3:18.

³⁶*Id.*

³⁷See *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So. 2d 216 (Miss. 1969); *Campbell v. Schmidt*, 195 So. 2d 87 (Miss. 1967); *Gulf & S.I.R.R. v. Simmons*, 153 Miss. 327, 121 So. 144 (1929).

³⁸See *Campbell v. Schmidt*, 195 So. 2d 87 (Miss. 1967); *Continental S. Lines v. Klass*, 217 Miss. 795, 65 So. 2d 575 (1953); *Gulf & S.I.R.R. v. Simmons*, 153 Miss. 327, 121 So. 144 (1929).

³⁹See *Marsh v. Johnson*, 209 So. 2d 906 (Miss. 1968); *Junkins v. Brown*, 238 Miss. 142, 117 So. 2d 712 (1960); *Continental S. Lines v. Klass*, 217 Miss. 795, 65 So. 2d 575 (1953); *Delta Chevrolet Co. v. Waid*, 211 Miss. 256, 51 So. 2d 443 (1951); *Goodyear Yellow Pine Co. v. Anderson*, 171 Miss. 530, 157 So. 700 (1934); *Standard Coffee Co. v. Carr*, 171 Miss. 714, 157 So. 685 (1934); *Illinois Cent. R.R. v. Causey*, 106 Miss. 36, 63 So. 336 (1913); *Mississippi Cotton Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735 (1909); *Mobile, J. & K.R.R. v. Hicks*, 91 Miss. 273, 46 So. 360 (1908).

⁴⁰See *Illinois Cent. R.R. v. Gwin*, 246 Miss. 67, 149 So. 2d 340 (1963); *Delta Chevrolet Co. v. Waid*, 211 Miss. 256, 51 So. 2d 443 (1951); *Goodyear Yellow Pine Co. v. Anderson*, 171 Miss. 530, 157 So. 700 (1934); *Standard Coffee Co. v. Carr*, 171 Miss. 714, 157 So. 685 (1934); *Gulf & S.I.R.R. v. Simmons*, 153 Miss. 327, 121 So. 144 (1929); *Mobile, J. & K.R.R. v. Hicks*, 91 Miss. 273, 46 So. 360 (1908).

⁴¹See *Oden Constr. Co. v. McPhail*, 228 So. 2d 586 (Miss. 1969); *Marsh v. Johnson*, 209 So. 2d 906 (Miss. 1968); *Campbell v. Schmidt*, 195 So. 2d 87 (Miss. 1967); *Illinois Cent. R.R. v. Gwin*, 246 Miss. 67, 149 So. 2d 340 (1963); *Junkins v. Brown*, 238 Miss. 142, 117 So. 2d 712 (1960); *Continental S. Lines v. Klass*, 217 Miss. 795, 65 So. 2d 575 (1953); *Delta Chevrolet Co. v. Waid*, 211 Miss. 256, 51 So. 2d 443 (1951); *Avent v. Tucker*, 188 Miss. 207, 194 So. 596 (1940); *Belzoni Hardwood Lumber Co. v. Langford*, 127 Miss. 234, 89 So. 919 (1921); *Illinois Cent. R.R. v. Causey*, 106 Miss. 36, 63 So. 336 (1913).

⁴²See *Petition of Canal Barge Co.*, 323 F. Supp. 805 (N.D. Miss. 1971); *Illinois Cent. R.R. v. Gwin*, 246 Miss. 67, 149 So. 2d 340 (1963).

⁴³120 Miss. 632, 82 So. 335 (1919).

[W]e cannot leave the evidence and speculate as to what trade or profession young Boone would have engaged in when discharged from the army, or as to what he would earn by any future employment.⁴⁴

In several wrongful death cases following *Boone* the court has clearly viewed the adequacy of the award in the light of decedent's earnings at the time of his death.⁴⁵ The decedent's earnings at the time of his death have also been considered in a number of recent cases where the court was considering the propriety of an award.⁴⁶ It is doubtful, however, that the specific point under consideration was brought to the attention of the court in those cases since the record does not reflect it.

The fact that the deceased had the right to expect his earnings to increase in the future was raised in *Illinois Central Railroad Co. v. Gwin*⁴⁷ in an effort to substantiate a sizeable judgment. The court apparently considered this contention. Although the verdict was ruled excessive, the majority opinion noted that the evidence showed the decedent's annual income was steadily increasing and that it was reasonable to believe that it would continue to do so for years to come.⁴⁸ The next year in *Jeffreys v. Clark*⁴⁹ the court brushed the question aside with the comment that there was no proof in the record that the decedent could not have increased his earnings.⁵⁰

A reading of the Mississippi cases leads to the conclusion that the question of whether the calculations of the deceased's life expectancy should be based on his earnings at the time of death or on his future earnings has not been squarely met and answered by the court since the early *Boone* case. Despite the holding in that case that the calculations must be based on the deceased's earnings at the time of his death, the court will probably now recognize that the prospective earning capacity of the deceased is an important consideration.⁵¹

⁴⁴*Id.* at 659, 82 So. at 338.

⁴⁵*Louisville & N.R.R. v. Garnett*, 129 Miss. 795, 93 So. 241 (1922); *Hines v. Green*, 125 Miss. 476, 87 So. 649 (1921).

⁴⁶*Oden Constr. Co. v. McPhail*, 228 So. 2d 586 (Miss. 1969); *Marsh v. Johnson*, 209 So. 2d 906 (Miss. 1968); *Rayborn v. Freeman*, 209 So. 2d 193 (Miss. 1968); *Campbell v. Schmidt*, 195 So. 2d 87 (Miss. 1967); *Miller Transp., Ltd. v. Espey*, 187 So. 2d 876 (Miss. 1966); *Illinois Cent. R.R. v. Ragan*, 252 Miss. 335, 173 So. 2d 433 (1965); *Winstead v. Hall*, 251 Miss. 800, 171 So. 2d 354 (1965); *Illinois Cent. R.R. v. Nelson*, 245 Miss. 395, 146 So. 2d 69 (1962).

⁴⁷246 Miss. 67, 149 So. 2d 340 (1963).

⁴⁸*Id.* at 72, 149 So. 2d at 341.

⁴⁹251 Miss. 129, 168 So. 2d 662 (1964).

⁵⁰*Id.* at 146, 168 So. 2d at 669.

⁵¹The recent cases seem to indicate that the court now considers prospective future earnings although they have never directly mentioned it.

The court should keep in mind that damages in wrongful death actions are awarded as a substitute for the money which the deceased and his family would have received had death not intervened. No evidence could be more relevant to the central issue in wrongful death actions than that pertaining to the probable future earnings of the deceased.⁵²

IV. DEDUCTION OF DECEDENT'S PERSONAL EXPENSES

Any discussion in this area must begin with the court's statement in *Illinois Central Railroad Co. v. Sanders*.⁵³

[I]t has been held under a statute similar to our own that living expenses of a decedent are not a deductible item in determining the value of the life expectancy to the decedent. . . . The earning capacity of a man is what he is capable of earning and is not what he is capable of saving.⁵⁴

An examination of *Sanders* will disclose that the court was not referring to the personal consumption expenditures which the decedent would have spent on his own upkeep. Two statements are made by the court. First, the court found "that living expenses of a decedent are not a deductible item in determining the value of the life expectancy to the decedent." This is, to say the least, an ambiguous statement. It can be construed as a reference to the personal living expenses of the decedent or to the living expenses of his family. Secondly, the court stated that "[t]he earning capacity of a man is what he is capable of earning and not what he is capable of saving." This statement was surely made in the context of the decedent's family living expenses, for what one saves is that which is left out of one's earning after he has discharged his family living expenses.

Additional light is thrown on the meaning of the court's statement by an examination of the authority on which it was made — the Connecticut case of *Michel v. New England Coal and Coke Co.*⁵⁵ In *Michel* the question was whether the trial court had erred in charging the jury that the amounts the decedent would have spent in support of his family should be deducted in arriving at the net value of decedent's life expectancy. The question of the deductability of the decedent's personal expenditures was not an issue in the case. Hence, *Michel*

⁵²SPEISER, *supra* note 7, § 3:18.

⁵³229 Miss. 139, 90 So. 2d 366 (1956).

⁵⁴*Id.* at 157-58, 90 So. 2d at 373.

⁵⁵132 Conn. 671, 47 A.2d 187 (1946).

cannot support any statement under consideration except that the decedent's family living expenses are not deductible. The Connecticut rule is clearly explained in the later case of *Floyd v. Fruit Industries*⁵⁶ where the court stated:

[T]he probable cost of future living expenses must be deducted from the allowance made as reasonable compensation for the total destruction of his capacity to carry on life's activities.⁵⁷

The Mississippi Supreme Court has indicated in several cases before and after the *Sanders* decision that in determining the value of the deceased's life expectancy, the amount that he would probably have spent for his personal living expenses had he survived should be deducted from decedent's gross earnings.

In *Hines v. Green*,⁵⁸ a pre-*Sanders* decision, the court stated that in determining the net value of the decedent's life expectancy the expenses that would have been incurred by the deceased on his own account in living and supporting himself must be deducted.⁵⁹ This language was cited with approval in *Louisville & Nashville Railroad Co. v. Garnett*⁶⁰ where the court went on to say:

[T]he measure of recovery [in a wrongful death action] is the net present cash value of what the deceased would have earned during his life expectancy, and not the gross amount.⁶¹

Another pre-*Sanders* case reflective of this view is *New Deemer Manufacturing Co. v. Alexander*.⁶² In ruling a jury instruction erroneous, the court commented that the instruction failed to call for a reduction of the gross award by that amount which the deceased would have spent for his own support.⁶³ In his dissenting opinion in *Cinquimani*,⁶⁴ a dissent which now represents the majority view, Judge Etheridge said:

[T]he value of the [life] expectancy, less the said necessary living expenses, was a recoverable element.⁶⁵

⁵⁶144 Conn. 659, 136 A.2d 918 (1957).

⁵⁷*Id.*, 136 A.2d at 926.

⁵⁸125 Miss. 476, 87 So. 649 (1921).

⁵⁹*Id.* at 498, 87 So. at 653.

⁶⁰129 Miss. 795, 93 So. 241 (1922).

⁶¹*Id.* at 808, 93 So. at 243 (emphasis added).

⁶²122 Miss. 859, 85 So. 104 (1920).

⁶³*Id.* at 896, 85 So. at 107.

⁶⁴137 Miss. 72, 102 So. 470 (1924).

⁶⁵*Id.* at 99, 102 So. at 475.

Several post-*Sanders* cases⁶⁶ have followed the net cash value formula. It is only logical that the word *net* would not appear in the formula if no deduction of the decedent's personal living expenses was to be made.

In *Ashcraft v. Alford*⁶⁷ the court approved a jury instruction which read "you may consider the present net cash value of the life of the deceased."⁶⁸ The case of *Jeffreys v. Clark*⁶⁹ supports the proposition that the decedent's personal living expenses should be deducted. In that case the court defined the damages due the beneficiaries as "any pecuniary advantage . . . which the interested parties had a reasonable expectation of deriving from the decedent had he continued to live."⁷⁰ This language seems to clearly dictate the deduction of the decedent's personal living expenses as they are not a "pecuniary advantage" which the beneficiaries had a "reasonable expectation" of receiving.

The general rule followed in American jurisdictions is that the decedent's personal living expenses, those expenses necessary to maintain health and well being such as food, clothing, and shelter, should be deducted from the decedent's gross earnings in determining the value of his life expectancy.⁷¹

V. OTHER DAMAGES

A. Pain and Suffering

Damages for pain and suffering of the decedent can be recovered in a wrongful death action if the plaintiff can establish that death was not instantaneous and that the decedent did in fact endure some conscious pain.⁷² It need only be established that the deceased was

⁶⁶*E.g.*, *Jeffreys v. Clark*, 251 Miss. 129, 168 So. 2d 662 (1964); *Ashcraft v. Alford*, 236 Miss. 25, 109 So. 2d 343 (1959); *Reed v. Eubanks*, 232 Miss. 27, 98 So. 2d 132 (1957).

⁶⁷236 Miss. 25, 109 So. 2d 343 (1959).

⁶⁸*Id.* at 30, 109 So. 2d at 344.

⁶⁹251 Miss. 129, 168 So. 2d 662 (1964).

⁷⁰*Id.* at 147, 168 So. 2d at 670.

⁷¹22 AM. JUR. 2d *Death* § 153 (1965).

⁷²*Oden Constr. Co. v. McPhail*, 228 So. 2d 586 (Miss. 1969); *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So. 2d 216 (Miss. 1969); *Boyd Constr. Co. v. Bilbro*, 210 So. 2d 637 (Miss. 1968); *Marsh v. Johnson*, 209 So. 2d 906 (Miss. 1968); *New Orleans & N.E.R.R. v. Shows*, 240 Miss. 604, 128 So. 2d 381 (1961); *Sandifer Oil Co. v. Dew*, 220 Miss. 609, 71 So. 2d 752 (1954); *Louisville & N.R.R. v. Whisenant*, 214 Miss. 421, 58 So. 2d 908 (1952); *Gordon v. Lee*, 208 Miss. 21, 43 So. 2d 665 (1949); *Murry Chevrolet Co. v. Cotten*, 169 Miss. 521, 152 So. 657 (1934); *Belzoni Hardwood Co. v. Cinquimani*, 137 Miss. 72, 102 So. 470 (1924); *Yazoo & M.V.R.R. v. Mullins*, 115 Miss. 343, 76 So. 147 (1917).

conscious and in pain for a brief period to present this issue to the jury. In *Boyd Construction Co. v. Bilbro*⁷³ the evidence as to pain and suffering showed only that before death the decedent cried out, "oh, me!" and the court stated:

She was therefore not killed instantly, and the jury had a right to value, as it saw fit, the pain which she did experience for such length of time as she remained conscious.⁷⁴

However, if it cannot be established that the decedent regained consciousness before death, no damages for pain and suffering will be allowed.⁷⁵ The mental anguish of the decedent's family is not recoverable in a wrongful death action.⁷⁶

B. Loss of Society, Companionship, and Services

Although in the early development of wrongful death damages in Mississippi no recovery was allowed for loss of society, companionship or services,⁷⁷ today they are recoverable damages to the beneficiaries.⁷⁸

In *Standard Coffee Co. v. Carr*,⁷⁹ the court approved the following instruction:

[Y]ou have a right to consider on the proof the present money value of any loss of any services and companionship, conjugal and otherwise, that the husband would likely have enjoyed...

⁷³210 So. 2d 637 (Miss. 1968).

⁷⁴*Id.* at 640.

⁷⁵*Coleman v. Teague*, 228 So. 2d 869 (Miss. 1969); *Illinois Cent. R.R. v. Gwin*, 246 Miss. 67, 149 So. 2d 340 (1963); *Moore v. Johnson*, 148 Miss. 827, 114 So. 734 (1927); *Gulf & S.I.R.R. v. Boone*, 120 Miss. 632, 82 So. 335 (1919); *Illinois Cent. R.R. v. Fuller*, 106 Miss. 65, 63 So. 265 (1913).

⁷⁶*St. Louis & S.F.R.R. v. Moore*, 101 Miss. 768, 58 So. 471 (1912).

⁷⁷*Mobile & Ohio R.R. v. Watly*, 69 Miss. 145, 13 So. 825 (1891).

⁷⁸*Oden Constr. Co. v. McPhail*, 228 So. 2d 586 (Miss. 1969); *Boyd Constr. Co. v. Bilbro*, 210 So. 2d 637 (Miss. 1968); *Boroughs v. Oliver*, 226 Miss. 609, 85 So. 2d 191 (1956); *Gulf, M. & O.R.R. v. White*, 219 Miss. 342, 68 So. 2d 458 (1954); *Louisville & N.R.R. v. Whisenant*, 214 Miss. 421, 58 So. 2d 908 (1952); *Delta Chevrolet Co. v. Waid*, 211 Miss. 256, 51 So. 2d 443 (1951); *Standard Coffee Co. v. Carr*, 171 Miss. 714, 157 So. 685 (1934); *Murry Chevrolet Co. v. Cotton*, 169 Miss. 521, 152 So. 657 (1934); *B. Kullman & Co. v. Sammuels*, 148 Miss. 871, 114 So. 807 (1927); *Jackson v. Port Gibson*, 146 Miss. 696, 111 So. 828 (1927); *Gulf & S.I.R.R. v. Boone*, 120 Miss. 632, 82 So. 335 (1919); *St. Louis & S.F.R.R. v. Moore*, 101 Miss. 768, 58 So. 471 (1912); see Comment, *Damages Under the Mississippi Wrongful Death Statute*, 13 Miss. L. J. 571 (1941).

⁷⁹171 Miss. 714, 157 So. 685 (1934).

the loss of any care and moral training to the children . . . during such minority.⁸⁰

The relationship between the decedent and the beneficiaries becomes important in this area of wrongful death damages. The amount awarded for this loss can be greatly increased or diminished by evidence establishing a close or distant family relationship. Evidence showing the remarriage of the decedent's spouse is admissible to show lack of "loss" in the society-companionship area of damages.⁸¹

C. Medical Expenses

The medical expenses incurred by the deceased are also recoverable under a wrongful death action.⁸² The terms of the Mississippi wrongful death statute clearly indicate that medical expenses are recoverable in that they would be recoverable as damages in an action by the decedent had he survived.⁸³ In fact, Speiser in his book on wrongful death recovery⁸⁴ states that in Mississippi medical expenses of the deceased are recoverable by the terms of the statute itself.⁸⁵ The propriety of such recovery in wrongful death cases is evidenced by the fact that no appeal has ever been made from their inclusion in an award. The court's mention of medical expenses has been limited to a casual inclusion thereof while passing on the adequacy or inadequacy of verdicts. In so doing, the court has included not only hospital and doctor bills but ambulance charges as well.⁸⁶

D. Funeral Expenses

The courts are divided on the question of whether or not funeral expenses may be recovered as an element of damages in a wrongful death action.⁸⁷

⁸⁰*Id.* at 724, 157 So. at 688. *But see* Anderson v. Eagle Motor Line, 423 F.2d 81 (5th Cir. 1970) (denying damages for loss of consortium).

⁸¹Campbell v. Schmidt, 195 So. 2d 87 (Miss. 1967).

⁸²Oden Constr. Co. v. McPhail, 228 So. 2d 586 (Miss. 1969); New Orleans & N.E.R.R. v. Thornton, 191 So. 2d 547 (Miss. 1966); Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956); Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955).

⁸³MISS. CODE ANN. § 1453 (Supp. 1971) states in part that the beneficiaries may recover the damages the decedent would have been entitled to had death not intervened.

⁸⁴*See* SPEISER, *supra* note 7.

⁸⁵*Id.* § 3:47.

⁸⁶Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956).

⁸⁷SPEISER, *supra* note 7, § 3:49.

Speiser lists Mississippi as among those states which allow recovery in wrongful death actions,⁸⁸ citing *Illinois Central Railroad Co. v. Crudup*.⁸⁹ However, an examination of that case will show that it is not authority for such a proposition as it was decided under Tennessee law.⁹⁰ *American Jurisprudence Second* also lists Mississippi as a state in which funeral expenses are recoverable, but again the case relied on, *Illinois Central Railroad Co. v. Perkins*,⁹¹ was decided under Tennessee law.⁹²

There are several Mississippi cases in which the court, when passing on the adequacy or inadequacy of a wrongful death verdict, mentioned the deceased's funeral expenses as a factor to be considered in making its decision.⁹³ In *Junkins v. Brown*⁹⁴ the court overruled an objection to the use of a chart which included among other items the decedent's funeral expenses. It does not, however, appear that in the above mentioned cases the court was called upon specifically to decide whether the deceased's funeral expenses were recoverable.

In the 1972 case of *Scott v. K-B Photo Services*,⁹⁵ the court was squarely presented with the question of the recoverability of funeral expenses in wrongful death actions. The court's response was that, except perhaps when the action was for the wrongful death of a minor,⁹⁶ funeral expenses could not be recovered.⁹⁷

E. Punitive Damages

Although unrecoverable under the original Lord Campbell's Act,⁹⁸ today punitive damages are recoverable in wrongful death actions under

⁸⁸*Id.* § 3:49 n.2.

⁸⁹63 Miss. 291 (1885).

⁹⁰*Id.* at 298.

⁹¹223 Miss. 891, 79 So. 2d 459 (1955).

⁹²*Id.* at 906, 79 So. 2d at 463.

⁹³*Burlingame v. Southwest Drug Stores*, 203 So. 2d 74 (Miss. 1967); *Miller Transp., Ltd. v. Espey*, 187 So. 2d 876 (Miss. 1966); *Winstead v. Hall*, 251 Miss. 800, 171 So. 2d 354 (1965); *American Hosp. & Life Ins. Co. v. Runnels*, 240 Miss. 685, 128 So. 2d 383 (1961).

⁹⁴238 Miss. 142, 117 So. 2d 712 (1960).

⁹⁵260 So. 2d 842 (Miss. 1972).

⁹⁶This was done in *Natchez, J. & C.R.R. v. Cook*, 63 Miss. 38 (1885).

⁹⁷260 So. 2d 842, 844 (Miss. 1972).

⁹⁸*Illinois Cent. R.R. v. Fuller*, 106 Miss. 65, 76, 63 So. 264, 267 (1913).

certain circumstances.⁹⁹ The court stated in *West v. Williams*¹⁰⁰ that punitive damages are a proper element of recovery when the defendant's conduct reflects "the willful and wanton disregard for human life."¹⁰¹ The defendant's conduct need not be intentional as the court pointed out in *Illinois Central Railroad Co. v. Fuller*,¹⁰² wherein it commented that punitive damages are called for when the defendant's act evidences "malice, gross negligence, or wantonness, or willful disregard."¹⁰³ Although the court has been restrictive in allowing punitive damages, if allowed, such damages can greatly increase an award.¹⁰⁴ Attorneys representing defendants in wrongful death claims should always request a jury instruction denying punitive damages because refusal of such an instruction, in the absence of acts making such damages proper, is reversible error.¹⁰⁵

VI. REDUCTION OF DAMAGES TO PRESENT WORTH

After ascertaining the amount of loss suffered by the plaintiff the jury must next determine what amount of money awarded *now* will compensate for that loss, taking into consideration that the money can be easily and safely invested and earn interest at some set annual rate.¹⁰⁶

The items which should be discounted to present worth are those which represent damages reasonably certain to arise *in the future* by reason of the decedent's death. These losses are prospective, and the plaintiff is in effect being prepaid for them. The damages awarded for loss of future services and support should therefore be discounted, while those awarded for medical expenses, loss of society and companionship, the decedent's pain and suffering, lost earnings to the date of trial, and punitive damages should not be discounted as they represent losses already realized.¹⁰⁷

⁹⁹*West v. Williams*, 245 So. 2d 591 (Miss. 1971); *Boyd Constr. Co. v. Bilbro*, 210 So. 2d 637 (Miss. 1968); *Morris v. Huff*, 238 Miss. 111, 117 So. 2d 800 (1960); *Boroughs v. Oliver*, 226 Miss. 609, 85 So. 2d 191 (1956); *Bush v. Watkins*, 224 Miss. 238, 80 So. 2d 19 (1955); *Sandifer Oil Co. v. Dew*, 220 Miss. 609, 71 So. 2d 752 (1954); *Belk v. Rosamond*, 213 Miss. 633, 57 So. 2d 461 (1952); *Illinois Cent. R.R. v. Fuller*, 106 Miss. 65, 63 So. 265 (1913).

¹⁰⁰245 So. 2d 591 (Miss. 1971).

¹⁰¹*Id.* at 593.

¹⁰²106 Miss. 65, 63 So. 265 (1913).

¹⁰³*Id.* at 79, 63 So. at 268.

¹⁰⁴*Cf. Tri-State Transit Co. v. Worley*, 197 Miss. 663, 20 So. 2d 477 (1945) (allowing punitive damages in amount double to actual damages).

¹⁰⁵*Boyd Constr. Co. v. Bilbro*, 210 So. 2d 637 (Miss. 1968).

¹⁰⁶This is the "discounting" process.

¹⁰⁷*See SPEISER, supra* note 7, § 8:1.

There is little room for argument over which elements of damages should be discounted, but the question of what discount rate should be used is not so settled. In Mississippi the rate of interest which a plaintiff might reasonably be expected to receive from an investment of his award, and which therefore should be used in reducing those damages to the present worth, is a question of fact for the jury.¹⁰⁸ The defendant should request an instruction to the jury charging them to apply as the discount rate that rate of interest which is reasonable and just, taking into consideration the proof presented¹⁰⁹ and their knowledge of the prevailing interest rates on safe, secure investments. The plaintiff should instruct the jury that they may take inflation into consideration when arriving at their verdict.¹¹⁰ This can greatly reduce the effect of the discount rate. The court stated in *St. Louis & San Francisco Railway v. Dyson*:¹¹¹

[W]e do not feel that the verdict is beyond the bounds of reason, particularly when consideration is given to the decreased purchasing power of the dollar.¹¹²

In the absence of evidence as to what discount rate is reasonable then the legal rate of interest (6 percent per annum in Mississippi)¹¹³ may be used. This was done in *Hines v. Green*¹¹⁴ where the court stated:

[F]inding the present value by dividing the total expectancy . . . by one plus six percent . . . which in the absence of other proof we will apply in this case.¹¹⁵

The court commented in *Louisville & Nashville Railroad Co. v. Garnett*¹¹⁶ that the total expectancy should be discounted at 6 percent, "the prevailing noncontract rate."¹¹⁷

¹⁰⁸This accounts for the wide variety of discount rates used in Mississippi; see cases cited note 118 *infra*.

¹⁰⁹The proof from the defense standpoint should consist of the rate of interest a safe investment can earn.

¹¹⁰*Cf.* *St. Louis & S.F. Ry. v. Dyson*, 207 Miss. 639, 43 So. 2d 95 (1949) (personal injury case); *Laurel Light & Ry. v. Jones*, 137 Miss. 143, 102 So. 1 (1924) (personal injury case). See generally 48 COLUM. L. REV. 264 (1948).

¹¹¹207 Miss. 639, 43 So. 2d 95 (1949).

¹¹²*Id.* at 657, 658, 43 So. 2d at 99.

¹¹³MISS. CODE ANN. § 39 (1956).

¹¹⁴125 Miss. 476, 87 So. 649 (1921).

¹¹⁵*Id.* at 498, 87 So. at 653.

¹¹⁶129 Miss. 795, 93 So. 241 (1922).

¹¹⁷*Id.* at 806, 93 So. at 243.

Cases can be found in which the court has approved a variety of discount rates.¹¹⁸ It is quite possible, with money earning the return it does today, that the defendant could justifiably argue for a discount rate of 7 percent per annum.¹¹⁹ However, the plaintiff, by using the rate of inflation today, could offset this by 4 or 5 percent per annum.¹²⁰

In any event, the discount rate which is used is of great import to the litigants. To illustrate, assume that a decedent had a life expectancy of twenty years and that he contributed \$10,000 per year to the support of his family. The gross amount in damages from loss of support is \$200,000. If this amount were discounted at 3 percent per annum the net loss would be \$148,774; at 4 percent per annum the net loss is \$135,903; at 5 percent per annum the net loss is \$124,662; at 6 percent per annum the net loss is \$114,700; and at 7 percent per annum the net loss is only \$105,940. From examining these figures it becomes readily apparent that from the defendant's standpoint it is important to establish as high a discount rate as possible for every dollar judiciously invested. The defendant should take great pains to explain the theory behind discounting an award to the jury because it often appears to be "unfair" to the average juror. The easiest way to do this is to get the jury to think of the plaintiff's loss in terms of a certain number of annual losses instead of one large loss. Their job is to award an amount that will yield the annual loss to the plaintiffs for the period of the decedent's expectancy. The defendant should then show that, using the figures above, an award of \$114,700 at 6 percent per annum will yield to the beneficiaries \$10,000 a year for twenty years, and that by awarding the plaintiffs \$200,000 they are over compensating them. The amount that can be accumulated over an extended period of years by investing at a high rate of compound interest is so surprisingly large that the average juror will be shocked into the realization that it requires a much smaller sum than he would ordinarily believe to provide the decedent's family with an income comparable to that which they enjoyed before the death of the decedent.

¹¹⁸See *Petition of Canal Barge Co.*, 323 F. Supp. 805 (N.D. Miss. 1971) (4 percent); *Bush Constr. Co. v. Walters*, 250 Miss. 384, 164 So. 2d 900 (1964) (6 percent); *Illinois Cent. R.R. v. Gwin*, 246 Miss. 67, 149 So. 2d 340 (1963) (5 percent).

¹¹⁹An interview with North Mississippi Savings and Loan in Oxford, Mississippi, revealed that for a large investment (\$100,000) for an extended period of deposit, a rate of 7 percent per annum or more is normal.

¹²⁰See SEC. OF TREAS., STATE OF FINANCES xvii (1971).

VII. CONCLUSION

The court's statement that there is no mathematical formula for measuring damages in wrongful death cases should be read in the light of Judge Roger's comment in *Illinois Central Railroad Co. v. Gwin*:¹²¹

[T]his Court must never forget, nor lose sight of, the ancient judicial guidepost on which is written the Latin maxim: "Corpus humanum non recipit aestimationem," and which means a human body is not susceptible of appraisement.¹²²

Viewed in that light the statement is understandable and true.

The fact remains that every wrongful death case presents the problem of relating a cash award equitably to the losses occasioned by the death of the decedent. Such a problem can be solved only if an accurate measure of the economic losses due to the death can be developed. It is true, however, that because of the difficulty in placing a monetary value on human life, the jury will not be completely bound by such a formula in estimating the amount of damages and will have wide latitude to exercise its sound judgment and good sense.¹²³

¹²¹246 Miss. 67, 149 So. 2d 340 (1963).

¹²²*Id.* at 76, 77, 149 So. 2d at 344.

¹²³*Catholic Diocese of Natchez—Jackson v. Jaquith*, 224 So. 2d 216 (Miss. 1969); *Illinois Cent. R.R. v. Nelson*, 245 Miss. 395, 146 So. 2d 69 (1962); *McDonald v. Moore*, 159 Miss. 326, 131 So. 824 (1931).

CONGLOMERATE MERGERS: A NEGLECTED ASPECT

Thomas Page Sharp* and Douglas Stutsman**

The conglomerate merger has become the *cause célèbre* of the antitrust writers both in law journals¹ and lay magazines.² Perhaps because of the curbs on the more traditional horizontal and vertical mergers, or perhaps because of the economic advantages, real or supposed, to be derived from the economic relationship, conglomerate mergers have accelerated greatly in the last few years.³ In spite of all the attention given to the conglomerate merger, virtually all the theory has been concerned with various effects on the market in which the acquired firm operates, while the economic effect in the market of the acquiring firm has been ignored. This is true not only for the journal articles, but more importantly, this has been the focus of the courts.

*B.S., M.S., Mississippi State University, J.D., Memphis State University, LL.M., Yale University; Member, Tennessee State Bar.

**M.A., University of Missouri, Ph.D., University of Mississippi, LL.B., University of Missouri School of Law; Assistant Professor of Economics, University of South Alabama, Mobile, Alabama.

¹See, e.g., Davidow, *Conglomerate Concentration and Section Seven: The Limitations of the Anti-Merger Act*, 68 COLUM. L. REV. 1231 (1968); Hinnegan, *Potential Reciprocity and Conglomerate Merger: Consolidated Foods Revisited*, 17 BUFFALO L. REV. 631 (1968); Means, *Conglomerates and Concentration*, 25 MIAMI L. REV. 1 (1970); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965); Comment, *Arguing the Guidelines For Conglomerate Mergers*, 5 CAL. W. L. REV. 101 (1968); Note, *Conglomerates and Section 7: Is Size Enough?*, 70 COLUM. L. REV. 337 (1970).

²See, e.g., *Coping With the Conglomerates*, AMERICA, June 14, 1969, at 682; *Economy May Be In Danger*, U.S. NEWS AND WORLD REPORT, June 16, 1969, at 10; *How To Regulate the Conglomerates*, BUSINESS WEEK, June 14, 1969, at 148; *Target: Conglomerates*, NEWSWEEK, April 7, 1969, at 59.

³Commissioner Reilly commented on this acceleration:

Recently I had cause to state that "to continue to emphasize action against horizontal mergers would be like mounting a vast hunting expedition for stalking the dinosaur." In the six year period, 1960-65, large horizontal mergers declined not only proportionately, but also in absolute number. However, during the same interval, conglomerate mergers increased from 17 percent to 71 percent of the total of all large mergers. (Remarks of Commissioner John R. Reilly on "Myths and Merger Policy," Antitrust Section of the District of Columbia Bar Association, in Washington, D.C., Feb. 23, 1967).

The focus of the Federal Trade Commission in the *Proctor and Gamble* case,⁴ where the FTC sought to enjoin a merger between the largest manufacturer of soap and the largest manufacturer of liquid bleach, was distinctly on the market that was being entered. Commissioner Elman, setting the theoretical stage for the analysis of the merger, stated:

For present purposes, the most significant market structure variable after concentration is the condition of entry into the market by new competitors. No firm will contemplate entry into a new market unless it feels reasonably sure of being able to obtain a satisfactory market share.⁵

The relevant line of commerce was then defined as the market for liquid bleach and the analysis focused on that market. The strength of Proctor was examined, but only to ascertain some probability that this economic strength would be used to give Clorox a competitive edge. The order of divestiture was appropriate to free the market for bleach from this potentiality and no further analysis was made, or needed, as to the effect of the divestiture on Proctor.

The Supreme Court classified the merger as a product-extension merger and affirmed the decision of the Commission.⁶ The Court placed emphasis upon the fact that the entered market was oligopolistic and that the acquisition eliminated the potential competition of the entering firm.

This focus on the entered market is by no means at the expense of inquiry into the strength of the acquiring firm. However, the ultimate determination about the strength of the acquiring firm will depend on whether or not the courts think that the firm will utilize the strength for the purposes of monopolization of the market *vis-a-vis* the acquired firm.

In the *Consolidated Foods* case⁷ attention was focused on the market for dried onion and garlic products, the market of Gentry, the acquired firm, and the only consideration given to Consolidated Foods was its power and ability to enforce a policy of reciprocity with the concomitant effect of a lessening of competition.

⁴Proctor & Gamble Co., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,673, at 21,558 (FTC 1963).

⁵*Id.* at 21,570.

⁶Federal Trade Comm'n v. Proctor & Gamble Co., 386 U.S. 568 (1967).

⁷Federal Trade Comm'n v. Consolidated Foods Corp., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,182, at 20,973 (FTC 1962). The Court of Appeals for the Seventh Circuit refused to enforce the order of the Commission. 329 F.2d 623 (7th Cir. 1964). This decision was then reversed by the United States Supreme Court. 380 U.S. 592 (1965).

In *Ekco Products Co. v. Federal Trade Commission*⁸ the Commission examined the strength of the acquiring company when it acquired a firm that enjoyed a virtual monopoly in a related field. The case was unusual in that the power of the acquiring firm was examined, not to explore the possibility of monopolization in the acquired firm's market, a situation already existing, but in the light of the perpetuation of the monopoly condition. While this position is to be lauded, the focus is still limited to the market of the acquired firm.

This focus on the market of the acquired firm has also been the policy for guidelines of the Federal Trade Commission,⁹ the Justice Department,¹⁰ and most recently of two Presidential Task Forces.¹¹ This

⁸347 F.2d 745 (7th Cir. 1965).

⁹The Federal Trade Commission has developed guidelines for various types of industries through its cases. Thus the guidelines for the dairy products industry were developed in *In the Matter of Beatrice Foods Company*, Docket No. 6653, Opinion of the Commissioner (April 26, 1965). In that case the Commission indicated that it would view with suspicion a merger of an industry giant with a not insubstantial dairy company, and mergers of "medium-sized" dairy companies, or an acquisition program by a "medium-size" company. Similar guidelines have been announced for food distribution, automotive tires, and the cement industry. See generally Keyes, *Guidelines Under Section 7 of the Clayton Act*, 1 ANTITRUST L. AND ECONOMICS REV. 79, 81 (1967).

¹⁰The Department of Justice guidelines for conglomerate mergers as to potential entrants states that it will "ordinarily challenge any merger between one of the most likely entrants into the market and: (i) any firm with approximately 25% or more of the market; (ii) one of the two largest firms in a market in which the shares of the two largest firms amounts to approximately 50% or more; (iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or (iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm." U.S. DEP'T OF JUSTICE, MERGER GUIDELINES ¶ 18 (1968).

Where there is danger of reciprocal dealing the Department will challenge the merger because it believes "that a significant danger of reciprocal buying is present whenever approximately 15% or more of the total purchases in a market in which one of the merging firms ('the selling firm') sells are accounted for by firms which also make substantial sales in markets where the other merging firm ('the buying firm') is both a substantial buyer and a more substantial buyer than all or most of the competitors of the selling firm." In addition, the Department will "ordinarily challenge (i) any merger undertaken for the purpose of facilitating the creation of reciprocal buying arrangements, and (ii) any merger creating the possibility of any substantial reciprocal buying where one (or both) of the merging firms has within the recent past, or the merged form has after consummation of the merger, actually engaged in reciprocal buying, or attempted directly or indirectly

concern with one market is the result of a failure on the part of the various courts and agencies to find an economic relationship (other than ownership) sufficient to warrant a focus on the market of the acquiring firm. For a while the Justice Department did not challenge pure conglomerate mergers¹² and two recent challenges have been unsuccessful

to induce firms with which it deals to engage in reciprocal buying, in the produce markets in which the possibility of reciprocal buying has been created." *Id.* at ¶ 19.

And as to conglomerate mergers which do not fit the above categories, the Department will scrutinize mergers "where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market." *Id.* at ¶ 22.

¹¹U.S. DEP'T OF JUSTICE, TASK FORCE ON ANTITRUST POLICY (1969):

Appendix B. *Merger Act*

Section 1. Prohibited Acquisitions.

(a) No large firm shall directly or indirectly merge with, combine with, or acquire any equity security in any leading firm or directly or indirectly acquire all or substantially all the assets used by a leading firm in any market in which it is a leading firm.

(b) No leading firm shall directly or indirectly merge with, combine with, or acquire any equity security in any large firm or directly or indirectly acquire all the assets of a large firm or a part thereof sufficient to constitute a large firm.

(c) This section shall not apply to firms acquiring any equity security solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, control of firms in which any equity security is acquired. Nor shall anything contained in this section prevent firms from causing the formation of subsidiary firms for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary firms.

(d) If any acquisition is approved by any federal agency, commission, board or other body, such approval shall result in total or qualified exemption of such acquisition from this Act to the same extent such approval results in exemption from section 7 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended. [President Johnson's Task Force].

The most recent task force on anti-trust policy offered no guidelines on conglomerate merger but came forth with a recommendation that the Justice Department minimize its activities in this area. [President Nixon's Task Force]. TRADE REG. REP. ¶ 50,108, at 55,135, 55,136 (1972).

¹²Reilly, *The Conglomerate Merger: A Need for Clarity*, 29 OHIO ST. L.J. 290, 309 states that "the government has yet to challenge publicly an acquisition in which there was no economic relationship existing between the acquiring and acquired firms."

thus far.¹³ Without an acceptable theory of economic harm done, the strategies of those who institute suits are likely to continue in failing to challenge the purely conglomerate merger.

The purpose of this article is not to quarrel with the approach of the Commission and the Justice Department, so far as it goes. Indeed, it may be agreed at the outset that the most important grounds for attacking conglomerate mergers are those relied on by these agencies, *i.e.*, reciprocity,¹⁴ elimination of potential competition,¹⁵ and the exercise of the power of huge financial resources¹⁶ as they affect the market of the acquired firm.

Nevertheless, there is an aspect of these mergers that has been neglected and will continue to be neglected so long as the Justice Department, the Commission, and the courts continue to view the problem from such a narrow perspective. Conglomerate mergers individually, and in the aggregate, affect the economy in a manner which cannot be observed when attention is limited to effects on the markets of acquired firms. Such mergers have the effect of further distorting the allocation of resources. They strengthen and entrench existing monopoly power and thereby make the economy even less responsive to consumer demands and desires.

While economists may disagree on many matters concerning both theory and policy, there is virtually unanimous agreement on the nature of the monopoly problem. Monopoly power is undesirable because it distorts the pattern of production away from the wants and needs of consumers; or, to view the matter from the other direction, competition is desirable because it results in the production of those goods and services most wanted by consumers. A clear and typical statement of the problem is given by Professor Clair Wilcox:

Monopoly prevents the allocation of resources in accordance with the pattern of consumer choice. The monopolist is likely to increase his profit by raising his price. He will then limit his output to the quantity that the market will take at the price that he has fixed. Consumers who would be willing to purchase larger quantities of his product at a lower price are left, instead, to buy goods that are wanted less. Resources are thus

¹³United States v. International Tel. & Tel. Co., 324 F. Supp. 19 (D. Conn. 1969), *appeal dismissed*, 92 S. Ct. 20 (1972); United States v. Northwest Ind., 301 F. Supp. 1066 (N.D. Ill. 1969).

¹⁴Federal Trade Comm'n v. Consolidated Foods Corp., 380 U.S. 592 (1965).

¹⁵Federal Trade Comm'n v. Proctor & Gamble Co., 386 U.S. 568 (1961).

¹⁶Power of the merging company is always considered, but only as to the potential effect in the structure of the market of the merged firm. *See* notes 9 & 10 *supra*.

diverted from those things which the community prefers to those which are, at best, a second choice.¹⁷

In other words, in an economy having a mixture of competitive industries and monopoly (oligopoly) industries, resources are directed so as to produce too little output in the monopoly industries and too much output in the competitive industries.

The purpose of this article is to describe the economic harm that flows from some pure conglomerate mergers and to examine pertinent decisions of the FTC and the courts to ascertain if legal action could successfully be applied to curtail this economic relationship. The authors of this article contend that the present trend toward more conglomerate mergers will further distort the pattern of production, for the effect of such mergers is to divert resources away from monopoly industries into competitive industries.

No one would contend that Congress always seeks a solution to social problems which is consistent with accepted economic theory, and little could be said that would add to the ongoing debate¹⁸ as to whether Congress was interested primarily in an economic solution when it passed the Sherman¹⁹ and Clayton²⁰ Acts or whether it was primarily interested in the preservation of small business. The policy proposed in this article would have the effect of preserving small business and the more important effect of improving the pattern of resource allocation.

When substantial monopoly profits continue over a period of time, as during periods of continuing prosperity such as we are now experiencing, the volume of retained earnings and working capital increases, and corporate decision makers must find outlets for these funds. They must find investment outlets for the continuing inflow of profit. The funds may be kept in the form of cash and marketable securities, and some increase in such assets would normally occur during such periods. This use of funds, however, has neither the advantage of increasing the current income of stockholders nor that of increasing the future sales revenue of the corporation. The funds may be used to pay out increased dividends, and normally dividend payments would increase during periods of continuing prosperity. But this use has limited attractiveness to corporate managers. While it may increase the satisfaction of stock-

¹⁷C. WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 12 (rev. ed. 1960).

¹⁸See, e.g., Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965); Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Note, *Conglomerates and Section 7, Is Size Enough?*, *supra* note 1.

¹⁹15 U.S.C. §§ 1-7 (1970).

²⁰15 U.S.C. §§ 12-27 (1970).

holders, it reduces the net worth of the corporation, and it does not lead to increased revenue.²¹

Another important use for corporate profit is reinvestment in plant and equipment. The profits of the firm may be used to expand the productive capacity of the firm. This use of funds is especially desirable from the standpoint of the consumer and the economy as a whole, for it results in a larger output and a lower price in the monopolized area than would exist in the absence of the expansion. In other words, to the extent that profits are used to expand output in the profit-making line, the consumer and the economy will benefit, for such expansion lessens the distortion of the pattern of resource allocation, thus making the pattern of production in the economy more responsive to consumer tastes and preferences. Furthermore, this outlet for profits has a distinct advantage from the standpoint of the corporate decision-maker. Such expansion will increase the amount (both in the dollar and the physical sense) of real assets held by the corporation, and more importantly, it will lead to increased sales revenue.

Professor William J. Baumol has made a study which indicates that decision-makers are more concerned with maximizing sales revenue than with maximizing profit.²² One motivation for this concern may be that executive incomes are determined primarily by the level of sales revenue rather than by the level of profit.²³ It may be added that the size of the corporation and the prestige that accompanies size will be measured by the volume of revenue rather than by the margin of profit.

²¹One could not share much empathy with the shareholding class if all that would be suffered by this class would be a lack of present cash with the concomitant benefit of having the funds retained in the capital structure of the corporation and adding to the earnings per share. Unfortunately the social ramifications are deeper. By unilaterally determining that a certain amount and no more is all that will be paid to the shareholder group, the management has made a decision as to allocation of resources that is likely to prove less desirable from an aggregate viewpoint than would be the individual decision of the shareholders who would attempt to place their funds (dividends) where the return would be larger. Presumably a larger return to shareholders would be paid by those companies who most need the capital. Firms who go into the market to attract capital are likely expanding output in less than competitive markets and this result is, of course, beneficial to the economy.

²²W. BAUMOL, *BUSINESS BEHAVIOR, VALUE AND GROWTH* (rev. ed. 1967).

²³Managerial salaries tend to be correlated with company sales more closely than with profits. McGuire, Chin & Elbing, *Executive Incomes, Sales, and Profits*, 52 AM. ECON. REV. 753, 756, 782 (1962). One study found almost no relationship between profit and executive compensation but found a high degree of correlation with sales and salaries. Roberts, *A General Theory of Executive Compensation Based on Statistically Tested Proportions*, 70 QUAR. J. ECON. 270 (1956). See also BUSINESS WEEK, Sept. 17, 1966, at 44-45.

Except in the extreme case where all of a firm's cost is fixed cost, the price-administering firm would produce at a higher output and lower price when it is attempting to maximize sales revenue than when it is trying to maximize profit. This fact is illustrated in Figures 1 and 2.

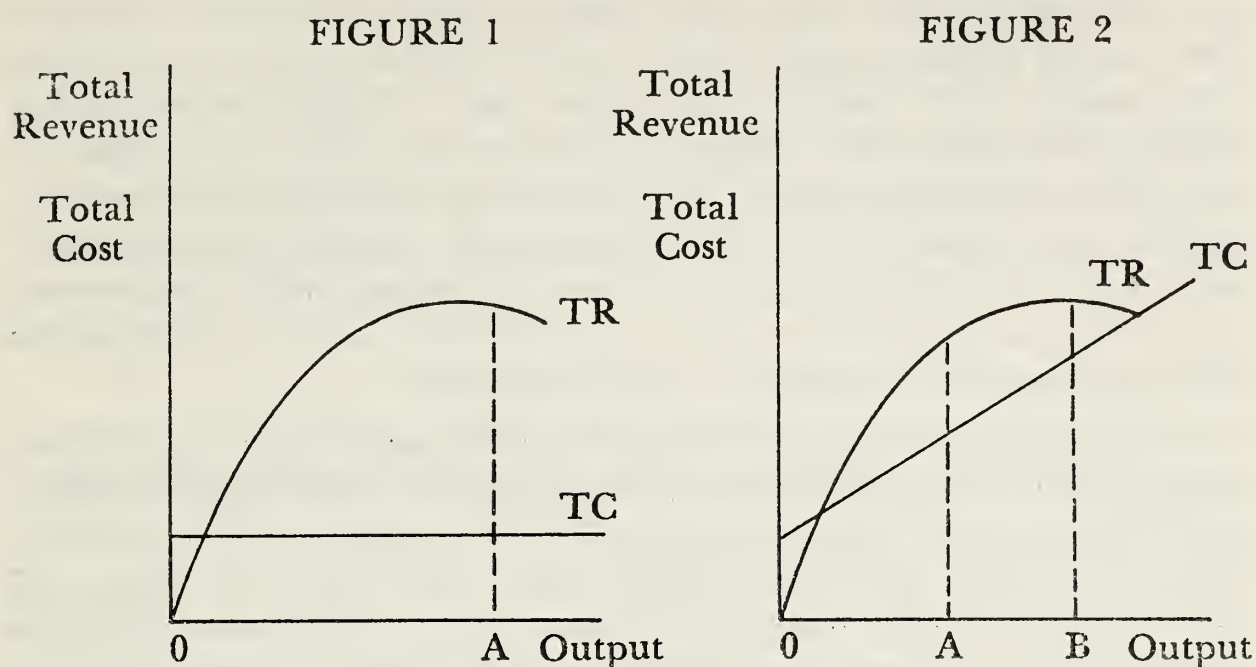


Figure 1 illustrates the extreme case where all cost is fixed cost. The firm's output in physical units is measured on the horizontal axis while total revenue and total cost are measured vertically. The shape of the total revenue curve, concave to the horizontal axis, simply demonstrates that larger quantities will be demanded by consumers at lower prices than will be demanded at higher prices. To put the matter another way, if the firm could sell all it wanted to sell at a constant price, if it could expand production indefinitely and continue to sell the ever increasing output at the original price, the total revenue curve would be a straight line sloping upward and to the right from the origin, for each additional unit of output would increase total revenue by the same amount. But of course this is not the case. Consumers will not buy as much of a product at a higher price as they will at a lower price; therefore, price and the quantity demanded will vary inversely. The shape of the total revenue curve reflects this inverse relationship, this "law of demand." The total cost curve in Figure 1 is a straight horizontal line reflecting the assumption that all cost is fixed cost. Total cost remains the same regardless of the level of output.

Profit is total revenue minus total cost and appears on the graph as the vertical distance between the total cost and total revenue lines. In

Figure 1 this vertical distance is greatest, and thus profit is maximized, at the output represented by Point A, where total revenue is highest, and so in this extreme case the profit-maximizing output is the same as the revenue-maximizing output.

Figure 2 is meant to illustrate the more realistic situation where all cost is not fixed cost. Total cost increases with increases in output because larger outputs require more variable inputs such as direct labor and materials. The total cost line appears as a straight line on the simplifying assumption that average variable cost is constant. In Figure 2, the profit-maximizing output, A, is necessarily lower than the revenue-maximizing output, B. The profit-maximizing output occurs (geometrically) where the slopes of the two curves are equal, while the revenue-maximizing output does not occur (geometrically) until the slope of the total revenue curve is zero, the top of the curve.

In the jargon of the economist, the profit-maximizing output must be lower than the revenue-maximizing output for the following reason. The decision-maker will maximize profit by setting a price where marginal (additional) cost and marginal revenue are equal. So long as all cost is not fixed cost, marginal cost must always be positive, and thus marginal revenue must be positive where it is equal to marginal cost (the profit-maximizing output). If marginal revenue is positive, demand must be elastic, and so long as demand is elastic, a lower price (and larger output) will result in larger total revenue. Thus, so long as all cost is not fixed cost, total revenue can be increased by lowering price below (and increasing output above) the profit-maximizing price.

Of course stockholders, like management, are concerned with making profit; however, because of the degree of separation of ownership and control²⁴ and because of the interest of management in increasing sales revenue, it is reasonable to assume that output will typically be expanded beyond the profit-making level. Management will attempt to maximize sales revenue but will be limited by some "minimum profit" constraint. To the extent that monopoly (oligopoly) corporations expand output beyond the profit-maximizing point toward the revenue-maximizing point, consumers benefit. Such an expansion leads to a pattern of production and resource allocation that is more responsive to the tastes and preferences of consumers.

The device of the conglomerate merger, however, enables the corporate decision-makers in the monopoly industries to expand sales revenue without sacrificing profit in the primary market because the expan-

²⁴See generally A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1937).

sion can occur outside the primary market of the monopoly. Thus, the decision-makers can keep output in the primary markets restricted to the profit-maximizing point while expanding output and sales in competitive secondary markets.

From the standpoint of the monopoly firm it would be desirable to acquire a number of relatively small firms producing products in competitive markets unrelated to the product of the acquiring firm, a truly conglomerate series of mergers. This development would provide the acquiring firm with opportunities to expand output and sales without noticeably affecting price in any market.²⁵ Thus, stockholders are blessed with maximum profit in the primary market while management obtains increased sales revenue through the increased sales of the conglomerate enterprise.

The same point may be made using a somewhat different approach. As before, the situation under consideration is one in which monopoly (oligopoly) corporations are accumulating substantial amounts of profit and must reach decisions concerning the use of such funds. Again, there are various outlets for these funds, including cash, marketable securities, dividends, and reinvestment in plant and equipment.

The decision-maker will move the funds into that use which appears to be the most advantageous; but in any particular use, the principle of diminishing marginal utility applies. As the firm increases its cash holdings, the attractiveness of still more cash holdings declines, *i.e.*, the greater the volume of cash held by the corporation, the smaller will be the need and the advantage gained from additional accumulations of cash. The corporation will hold cash and certain liquid assets, such as short term government securities, to meet its liquidity needs, but such needs are limited, and as the volume of liquidity holdings increases, the precautionary needs yet to be satisfied with additional amounts of liquid assets are less pressing.

So with the payment of dividends, the advantage to be gained from additional dividend payments declines as the amount of dividend payments increases. When the corporation moves from a position of paying no dividends to one of paying a dividend representing, perhaps, a 2 percent return on stockholder investment, it gains considerable advantage in the form of satisfaction of existing stockholders and attraction of additional stockholders. If dividend payments increase from 2 percent to

²⁵The ultimate effect will be the same if the acquisition is made by purchase or through a stock-for-stock exchange. Of course the purchase has the immediate effect of divesting the acquiring firm of retained earnings while the stock exchange only sets the stage for a future divestment of retained earnings through an increase of production in the competitive market.

4 percent, there will be additional gain of a similar nature as there will be as the rate continues to increase; but clearly the decision-maker will not see as much advantage in moving from 2 to 4 percent as he did in going from 0 to 2 percent, and there will not be as much additional advantage in going from 10 to 12 percent as there was in going from 2 to 4 percent, ect.

The same principle applies to reinvestment in plant and equipment. As the level of new investment increases, the advantage from further investment declines, and this is the case both when management is attempting to maximize sales revenue and when it is trying to maximize profit. This is especially true of monopoly (oligopoly) corporations where increased output must be sold at lower prices than would exist in the absence of the increased output. The marginal efficiency of investment falls as the level of investment increases.

Moreover, the remaining alternative uses for funds may be properly viewed as the cost of any particular use. Thus, if the firm is paying dividends, the real cost to the firm is the cash and marketable securities, and the investment in plant and equipment that must be foregone in order to pay the dividends. Any particular use requires the sacrifice of alternative uses. The decision-maker will maximize his total gain by allocating the funds in a manner such that the advantage obtained from each use is the same at the margin.

The larger the number of outlets for such funds, the smaller will be the amount devoted to each use. The device of the conglomerate merger provides the firm with an additional outlet, and more importantly, it provides an outlet that is an especially attractive substitute for reinvestment in plant and equipment in the firm's primary market. Thus, the conglomerate merger provides most of the advantages of reinvestment in the primary market while eliminating the most severe disadvantage. As with reinvestment in the primary market, the conglomerate merger provides an increase in physical assets and sales revenue, but it does not lead to a lower price and lower profit in the primary market. While the outlet represented by the conglomerate merger will reduce the amount of funds devoted to each alternative use, it will reduce most severely the amount devoted to reinvestment in plant and equipment in the primary market.

The conclusion to be reached can be stated as follows: When monopoly (oligopoly) firms use the device of the conglomerate merger, funds are diverted away from investment in plant and equipment in the monopoly market into investment in acquisition and expansion in competitive markets. If such firms were denied this outlet for profits

accruing in the primary market, there would be more expansion in the monopoly areas of the economy and less in the competitive areas. The continuing trend toward the pure conglomerate merger will worsen the distortion of resource allocation in the economy and will lead to a pattern of production less responsive to the wants and needs of consumers.

It may be argued, of course, that if such mergers were prohibited, the same result could be achieved through internal expansion of the monopoly firm into the foreign market,²⁶ and this is a possibility; however, the same possibility exists in situations in which horizontal and vertical mergers are prohibited by section 7 of the Clayton Act.²⁷ It goes without saying that harmful economic effects should be prevented when it is legally possible, even though similar effects might result from other means within the law.

Furthermore, the probability of internal expansion in the case of conglomerate enterprise is smaller than in the case of vertical and horizontal expansions; by definition, conglomerate expansion requires diversion into unrelated activities. In all situations, horizontal, vertical, and conglomerate, merger has the advantage (over internal expansion) of providing the expanding firm with a going concern, thus avoiding the difficulties and expense of organization and entry into the market. This factor is especially important in conglomerate situations. In the case of conglomerate internal expansion, the expanding firm must move into lines of business in which plant and equipment needs, personnel qualifications, and production and marketing procedures are likely to be quite different from those of the expanding firm in its primary line of business, and thus the difficulties and expense of such expansion are likely to present substantial barriers. Thus, if the conglomerate merger device were foreclosed, the firm would have a strong incentive to restrict its internal expansion to its primary market.

Because the pure conglomerate merger has been relatively exempt from challenge is not to be mistaken for a lack of concern on the part of the enforcement agencies.²⁸ It would seem that the pure conglomerate merger has gone unchallenged because of the lack of an adequate theory of economic harm. Indeed, many writers have gone to great lengths to explain how economic harm is impossible under this set of circum-

²⁶The term "foreign market" is meant to describe the market for products unrelated to the product of the acquiring firm.

²⁷Clayton Act § 7, 15 U.S.C. § 18 (1970), formerly ch. 25, § 7, 38 Stat. 731 (1914).

²⁸The pure conglomerate has been the concern of former Commissioner Reilly. Reilly, *supra* note 12.

stances.²⁹ Typical is the following statement: "Moreover, a rigid prohibition against conglomerate acquisitions would impair the effective operation of the market as a corrective device by inhibiting the flow of assets into areas of greatest productivity."³⁰ The argument is made that permitting a company with economic power to enter into an oligopolistic market which is in effect acting as a cartel would have a beneficial economic effect.³¹ The acquiring firm, if a firm smaller than the oligopoly leader is acquired, would want to exploit its investment by expanding its production in the acquired market with the result that output would increase and price would fall in the acquired market. The acquiring firm might prefer to buy a leading firm, but the recognized grounds for potential harm are apparent and the antitrust risks much greater. Consequently, the argument is that permitting the firm to acquire a less-than-leading firm would bring about positive economic good, and any rule that would prohibit this would be detrimental to the overall economic welfare.

The economic validity of this proposition is clear so far as it goes, but it ignores the disadvantageous economic effects on the primary market of the acquiring firm. Additionally, it rests on the dubious assumption that the acquiring firm, which has no inclination to engage in price competition in its own primary market, will choose to engage in such competition in the foreign oligopoly market. It seems at least as reasonable to assume that the acquiring firm will become a cooperative member of the foreign oligopoly market.

The most harmful effects are likely to result when the acquiring firm merges into a foreign market which is not already a tight oligopoly, and as matters now stand, these situations are least likely to come under the scrutiny of the regulatory agencies. It is in this situation that resources are diverted directly away from monopoly areas of the economy into more competitive areas. In looking solely at the probability that the acquiring firm will exert undue power in the competitive foreign market or that it will become the dominant firm in that market, the agencies and the courts are not only ignoring important economic aspects

²⁹"The fact is that a truly conglomerate merger cannot be attacked to maintain competition because it has no effect on any market structure." Adelman, *The Anti-Merger Act, 1950-1960*, 51 AMER. ECON. REV. 236, 243; Sichel, *The Proctor & Gamble-Clorox Decision and the Economics of Conglomerate Mergers*, 12 ANTITRUST BULL. 1081.

³⁰Rill, *Conglomerate Mergers: The Problem of "Superconcentration"*, 14 U.C.L.A. L. REV. 1028, 1053 (1967).

³¹Shepard, *Conglomerate Mergers in Perspective*, 2 ANTITRUST L. & ECON. REV. 15, 27-29. See also Note, *Conglomerate Mergers and Section 7: Is Size Enough?*, *supra* note 1.

of these mergers, but they are also misreading the intent of the acquiring firms. The acquiring firm may have no intent whatever of exerting economic power or becoming a dominant firm in the foreign market. Its intent may be to expand real assets and sales revenue without jeopardizing profits in its primary market, and while there is nothing particularly aggressive and certainly nothing unethical about this intent, the overall economic effect is a direct diversion of resources away from monopoly areas into competitive areas of the economy.

The contention of this article is that, while the courts have been correct in selecting the pertinent economic issues involved in conglomerate merger cases, their selection has been too narrow and restricted. They have not selected issues which are economically irrelevant, but they have failed to see some which are relevant. Commissioner Elman, dissenting in the *National Tea* case,³² argues against the formulation of per se rules without relevant economic inquiry. He would prefer a rule making procedure to proscribe certain types of acquisitions and would ask the following questions: Will the substitution of the acquiring firm in the market raise the barriers to new entry? Will its presence frighten or dampen the competitive vigor of the existing firms? Does potential competition play an important role as a market regulator and did the entry of the acquiring firm by acquisition constitute the elimination of any meaningful or significant potential competition? Is the industry one in which the national chain has significant advantages over local or regional competitors? Are there any industry conditions which would indicate that a continuation of wide-scale merger activity will eliminate middle-sized local competitors as an effective source of competition?³³ To this list of wholly relevant questions we would add one other. Does the merger result in a diversion of funds and resources away from a less competitive market into a more competitive market? If the answer is in the affirmative the merger should be denied, for on its face it is detrimental to the primary objective of competitive enterprise. It is another step away from a consumer-directed economy toward an administered economy.

It would seem beneficial to formulate a rule that would focus on the strength of the firms in both the market of the acquired firm and the acquiring firm, for the express purpose of preventing monopolization in either market or for the purpose of preventing acquisitions which tend to entrench existing monopoly and further distort the pattern of produc-

³²National Tea Co. [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,463, at 22,694 (FTC 1966).

³³*Id.* See also *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

tion. Certainly an inquiry into the relevant economic factors of the merger, if such an inquiry can be made with some efficiency and some degree of certainty, is to be preferred over an arbitrary "cut-off" point that precludes further acquisitions. The failure of such inquiries to produce tangible results in the past probably accounts for the numerical limits set by many writers and the commissions.³⁴ Antitrust decisions must by necessity paint with a broad brush.

If the obstacles to a thorough and meaningful economic analysis are insurmountable so that beneficial results cannot be accurately weighed against harmful effects, the harmful effects should prevail. The argument was made in *United States v. Philadelphia National Bank*³⁵ that although the merger of two large Philadelphia banks would possibly have anti-competitive effects in the local market, the merger was necessary to enable the bank to compete in the national money market with the large banks of other regions. This argument was expressly rejected by Mr. Justice Brennan who said:

We reject this application of the concept of "countervailing power." . . . If anti-competitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader.³⁶

.....

We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anti-competitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.³⁷

This focus on the anti-competitive effects without any attempt to balance pro-competitive effects is the only realistic course to take in view of the less-than-adequate body of economic theory concerning conglomerate mergers. Furthermore, this lack of balancing power is not to be re-

³⁴See, e.g., Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960); PRESIDENTIAL TASK FORCE REP., *supra* note 11.

³⁵374 U.S. 321 (1963).

³⁶*Id.* at 370.

³⁷*Id.* at 371.

gretted, because the overall effects, coupled with rules of prohibition, would be beneficial to the economy.

If an acquiring firm with considerable economic power is prohibited from acquiring essentially any firm via the merger route, but expansion is still desired by the company, there will be a stronger incentive for the firm to expand in its own market, and thus the harmful (restrictive) economic effects will be reduced in that market. Expansion into foreign markets via the route of the conglomerate merger would be left to firms not having monopoly power in their own markets, and in such situations the added competition in the market of the acquired company would be obtained without diverting resources away from industries where output is already too restricted.

While the primary purpose of this article is to show the economic harm resulting from conglomerate mergers, a reasonable theory of economic harm is not by itself sufficient to curtail such merger activity. The question to be answered is whether or not the antitrust statutes are adequate to cope with this violation and whether the courts have recognized this power. Although they have not confronted the precise issue, the Federal Trade Commission and the courts have indicated that the power exists.

In *Scott Paper Co.*,³⁸ Scott had made a series of acquisitions of suppliers, a vertical merger, and the Commission brought suit to compel divestiture under section 7 of the amended Clayton Act. The theory of the case was not a conventional vertical theory, foreclosure of competition, but rather was brought on a theory of allowing Scott to maintain its dominance in its production. Scott had not adequate production facility to maintain its dominant position in an oligopolistic market and needed more facilities to keep the other companies from supplying the increased demand. The Commission stated that an oligopolistic market is economically unhealthy and initially in the opinion focuses on the slight increase in market power by merger being proscribed, but it did not limit the proscription this narrowly. "Section 7 was intended to foreclose the easy path, through corporate acquisitions, to *maintaining* or achieving market dominance, and to encourage firms to take the harder, but socially more beneficial, path of internal growth."³⁹

In *United States v. Philadelphia National Bank*,⁴⁰ the Court focused on the aggregate economic effects on the economy when it interpreted the "may be to substantially lessen competition" clause:

³⁸[1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,705, at 21,632 (FTC 1964).

³⁹*Id.* at 21,637 (emphasis added).

⁴⁰374 U.S. 321 (1963).

It [the clause] requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon the competitive conditions in the future; this is what is meant when it is said that the amended Sec. 7 was intended to arrest anticompetitive tendencies in their "incipiency". . . . Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market.⁴¹

This was a horizontal merger and the economic effects were naturally highlighted, but there is no reason to believe that the Court would not make the same finding in any other merger case if the proscribed effects are present. The important fact to consider is the concern of the Court with the *structure* of the competitive economy. Indeed, this definition of competition that focused on structure was broadened in the same case:

If concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.⁴²

This view and concern with structure has been expressed by the lower courts. In *Crown Zellerbach Corp. v. Federal Trade Commission*,⁴³ the court evidenced an acute concern with the structure of power in the economy when it said:

To borrow a phrase from *Universal Camera*, Congress expressed a mood that acquisition of a rival firm by a larger one, resulting in a substantial increase in the concentration of power in the *absorbing* concern, is to be prohibited for the reason that such increased opportunity for domination will probably lessen competition or tend to create a monopoly. It is its tendency to concentration of power that condemns this merger.⁴⁴

In *United States v. Bethlehem Steel Corporation*,⁴⁵ the court held that "[t]end to create a monopoly" clearly includes aggravation of an existing oligopoly situation."⁴⁶

This view of the structure of the economy taken by the courts and the regulatory agencies clearly expresses a belief in the basic tenets of a free economy which is grounded on the notion of consumer choice. From the economic standpoint, "competition" is not a good end in itself nor is "monopoly," in itself, an economic evil. Competition is desired because it leads to a pattern of production and prices most compatible with consumer demand, while monopoly, to the extent it exists, detracts

⁴¹*Id.* at 362.

⁴²*Id.* at 365 n.42.

⁴³296 F.2d 800 (9th Cir. 1961).

⁴⁴*Id.* at 827 (emphasis added).

⁴⁵168 F. Supp. 576 (S.D.N.Y. 1958).

⁴⁶*Id.* at 607.

from such a pattern of production and prices. While it has been argued that protection of the small concern was the motivation of the Congress when it passed much of the antitrust legislation, certainly no one could quarrel with an enforcement policy that led to a greater degree of consumer freedom and preserved small business.

With a theory of economic harm and the authority of the courts and regulatory commissions to act under the existing statute established, there remains the problem of proof of a violation within the theory and the statutes. As in most antitrust matters, conclusive proof of the economic harm in question is all but impossible. The agencies and the courts must assess probabilities.

Two recent challenges to pure oligopolistic mergers⁴⁷ were markedly similar in rationale and outcome. In *United States v. International Telephone and Telegraph Corp.*,⁴⁸ the Justice Department sought to enjoin IT&T, one of the nation's largest corporations, from acquiring Grinnell Corporation, a large manufacturer of automatic sprinkling devices. In *United States v. Northwest Industries, Inc.*,⁴⁹ the Justice Department attempted to enjoin B.F. Goodrich, a large rubber manufacturer, from acquiring Northwest Industries, a holding company which controlled a railroad and several chemical companies. Both judges set the same standard of proof for the Department, demonstrable evidence that specific proscribed economic effects would probably result from the merger. In both cases the Department did not meet this burden of proof. The government had proceeded on the usual grounds of reciprocity and concentration. When it was not able to demonstrate likely reciprocal dealing in either case the Department could only fall back on concentration. Neither judge would deny the merger solely because of the size of the companies.

A more recent case, *Kennecott Copper Corp. v. Federal Trade Commission*,⁵⁰ involved a merger between the Kennecott Copper Corporation and the Peabody Coal Company. Kennecott is the nation's largest copper producer and the 55th largest corporation in terms of assets, and Peabody is ranked 186th in the nation in terms of assets. In 1971 the merger had been struck down by the Federal Trade Commission.⁵¹ The court accepted the Commission finding that the market entered was not oligopolistic. The focus was not on a large company entering an oligopolistic

⁴⁷See cases cited note 13 *supra*.

⁴⁸324 F. Supp. 19 (D. Conn. 1970), *appeal dismissed*, 92 S. Ct. 20 (1972).

⁴⁹301 F. Supp. 1066 (N.D. Ill. 1969).

⁵⁰No. 71-1371 (10th Cir., Sept. 15, 1972).

⁵¹*Kennecott Copper Corp. v. FTC*, No. 8765 (F.T.C., May 13, 1971).

market; instead it was on the probability of the market becoming oligopolistic. The Commission decision was upheld on the grounds that Kennecott was a potential competitor whose entrance, either through internal expansion or acquisition of a smaller company, would have a beneficial effect on a market likely to become oligopolistic.

Kennecott had a surplus of excess cash reserves forecast to be one billion dollars in 1980 and was seeking to find a satisfactory outlet for these reserves. The court stated that the coal industry "offered about the only outlet for these reserves." Kennecott had entered the coal industry in 1963 by acquiring the Knight Coal Company of Utah, but this small firm had not been a sufficient outlet. As a result, Kennecott, obviously a monopoly in the copper industry, rejected the traditional outlets. A large coal company offered the more desirable acquisition for Kennecott. The court stated that "it was reasonable for the Commission to conclude that Kennecott would use its immense resources to gain for Peabody, already the number one producer in the industry, an even larger share of a market which promises to be a concentrated one in a relatively short time." This speculation may be true, but it is also likely that Peabody offered the largest outlet in the coal industry for the funds, and Kennecott made the purchase with no idea of monopolizing the industry. The threat of striking down the merger when in fact the market has become oligopolistic is always present.⁵²

Even if Kennecott never intended to monopolize the coal industry, there is still a misallocation of resources if a purchase into the coal industry is of a large or small company. The issue is only the degree of misallocation. This will be the case if the focus is always on the effect of the market being entered.

The type of conglomerate merger that is the concern of this article is that in which a firm with monopoly (oligopoly) power in its own market is acquiring a firm in a competitive foreign market. Here the courts will likely be even more cautious than in the cases above where the merger was between large firms. However, the economic harm at issue is the direct diversion of resources away from a monopolized area into a competitive area and the problem should be attacked. Clearly the acquiring firm would argue that such funds would not otherwise be used for investment in plant and equipment in its own market if the merger were not allowed, but that they would be used for other purposes, such as dividend payments and investment in marketable securities. The problem of proof here is much like that involved in establish-

⁵²United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).

ing an elimination of potential competition.⁵³ It is impossible to prove conclusively that other firms, which would otherwise have entered the foreign market, will not do so as a result of the merger, or that the acquiring firm itself would enter the foreign market through internal expansion if the merger were denied. The issue is a very "hypothetical" one to say the least.

In the issue at hand—cases where a monopoly firm is seeking to merge with a firm in a competitive foreign market—a probability that resources will be diverted away from the monopolized area into the competitive area is more easily established. The attempt to merge, in itself, shows the inclination of the acquiring firm to expand its real assets and sales revenue, *i.e.*, the inclination to become a larger company. In the face of such inclination, it would seem unreasonable to accept the contention of the acquiring firm that all of such funds would otherwise be used for purely financial transactions with none being devoted to an internal expansion of the firm. In short, a large firm with an inclination to become larger is likely to expand internally when the opportunity for merger is denied. Also, it could be argued that the adverse economic effects are presently occurring because of the merger; and the acquiring firm is maintaining market dominance.

To circumscribe essentially all mergers which concern at least one firm that has substantial economic power may seem an undue curtailment of the freedom to do business, but it must be remembered that no one has a license to power.⁵⁴ Mergers will be left to those firms with less economic power, while those with power will find it more attractive to pursue internal expansion. The economic implications are clear and beneficial. The adoption of such a policy would be a significant step in the direction of a more consumer-responsive economy. The courts and regulatory agencies should consider an enforcement policy that would include attention to this neglected aspect of merger activity.

⁵³One product extension conglomerate merger was curtailed because the merger would deter potential entrants. *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968).

⁵⁴Even good monopolies are proscribed. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

COMMENTS

INDEMNITY AMONG JOINT TORTFEASORS

I. INTRODUCTION

Modern society presents an increasing number of situations in which tort liability may be imposed against more than one party in a single action. Whenever such a situation offers an injured party a choice of defendants from whom to seek recovery, claims for indemnity and contribution may arise. Frequently in multiple party negligence litigation a defense attorney is equally concerned with the possibility of shifting the ultimate loss to a codefendant or third party defendant as he is with defending the plaintiff's claim on the merits.

The doctrine of indemnity is an ancient legal concept which has been applied to numerous and varied relationships. Basically, indemnity is a restitutionary device used to effectuate a fair allocation of loss between two or more persons jointly liable for harm caused to a third person. The scope of this comment is restricted to a consideration of those instances in which one joint tortfeasor is entitled to indemnity from another for amounts paid by the former to compromise or satisfy a third party's claim or judgment. This comment will attempt to review the evolution of the indemnity doctrine in Mississippi, to categorize the different situations where indemnity is allowed, and to explain the complexities inherent in this concept.¹

II. ORIGIN OF INDEMNITY

Historically, courts have been unsympathetic to wrongdoers in the adjustment of their affairs.² Common law courts were particularly reluctant to intervene in disputes between tortfeasors, probably because torts of that day frequently involved an element of moral turpitude.³ In the famous case of *Everet v. Williams*,⁴ where one highwayman sued another for an accounting of their plunder, judicial antipathy for

¹For an exhaustive treatment on indemnity, see Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952) [hereinafter cited as Davis].

²E.g., Hodges, *Contribution and Indemnity Among Joint Tortfeasors*, 26 TEX. L. REV. 150, 162 (1947).

³Comment, *Contribution and Indemnity Among Joint Tortfeasors*, 33 TENN. L. REV. 184 (1966).

⁴Noted in 9 L.Q. REV. 197 (1893).

conflicts between transgressors is well documented.⁵ But it is generally agreed that the early English case of *Merryweather v. Nixan*⁶ promulgated the rule of disallowing contribution between joint tortfeasors.⁷ This rule was based on the common law fault concept which required every wrongdoer to be held personally accountable for his own torts whether active or passive.⁸ Thus, degrees of fault were not recognized, and common law courts, for the same reason, refused to enforce contracts designed to allow a party to avoid liability for his own negligence.⁹ Although *Merryweather* prescribed contribution only where the mutual misconduct was wilful or intentional,¹⁰ eventually this restriction was eliminated. In this regard, American courts have failed to distinguish between intentional or wilful torts and unintentional or negligent torts in applying the rule against contribution.¹¹

Because such widespread adoption and imposition of the controversial¹² rule often inflicted rather harsh and inequitable results,¹³ it was inevitable that exceptions to the rule against contribution would arise. Particularly as society became more complex and new inter-relationships arose between varied business interests, justice demanded the formulation of legal and equitable principles permitting reim-

⁵The plaintiff's bill was dismissed and his solicitors each fined fifty pounds for contempt. *Id.* (The parties were subsequently hanged).

⁶101 Eng. Rep. 1337 (K.B. 1799).

⁷See Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1899); Annot., 60 A.L.R.2d 1366 (1958); RESTATEMENT OF RESTITUTION § 102 (1937) sets forth the rule as follows:

Where two persons acting independently or jointly, having negligently injured a third person or his property for which injury both became liable in tort to a third person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other.

⁸H. MCNEAL, INDEMNITY—A GENERAL REVIEW 4 (1963) (Defense Law Institute Monograph) [hereinafter cited as MCNEAL]; See Note, *Contribution and Indemnity Among Tortfeasors*, 31 MONT. L. REV. 69, 71 (1969), which suggests as additional justification for the rule: (1) tort law is a punitive force for discouraging anti-social conduct and a denial of contribution deters the commission of such conduct; (2) the law has no scales to determine the relative fault of the parties; (3) contribution is impractical in terms of judicial expenditure of time and expense.

⁹MCNEAL, *supra* note 8, at 4.

¹⁰101 Eng. Rep. 1337 (K.B. 1799).

¹¹Allen, *Joint Tortfeasors—A Case for Unlimited Contribution*, 43 MISS. L.J. 50, 52 (1972) [hereinafter cited as Allen].

¹²For a series of articles for and against the rule, see Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941); James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); James, *Replication*, 54 HARV. L. REV. 1178 (1941).

¹³Allen, *supra* note 11, at 51-53.

bursement to those passively negligent parties from those found actively negligent.¹⁴ In response to a changing society, courts became more receptive to the argument that there should be an adjustment of the common burden away from a mere passive wrongdoer, individually saddled with complete liability because of technical reasoning from outmoded concepts of tort liability.¹⁵ American jurisdictions, while retaining the rule against contribution, quite early introduced the exception which permitted one tortfeasor to be indemnified by a co-tortfeasor under certain circumstances.¹⁶ At least as early as the 1930's, these indemnity exceptions were firmly established, while contribution, even in those few jurisdictions where it was permitted, was largely restricted. Thus, the doctrine of indemnity, allowing exoneration or reimbursement from the primary wrongdoer to the party having satisfied the injured person, developed in a majority of American jurisdictions where contribution was not permitted. Either the party incidentally or nominally liable was granted indemnification or there could be no apportionment of the loss among those responsible.¹⁷

In Mississippi contribution was not allowed until 1952,¹⁸ but indemnity was a recognized cause of action as early as 1838.¹⁹ Mississippi, like other jurisdictions which initially allowed indemnity but refused contribution, required the entire burden to be placed upon the first joint tortfeasor to satisfy the joint judgment, regardless of his degree of culpability unless he could prove indemnity against a co-wrongdoer. But the significance of indemnity, even in those jurisdictions which now allow both remedies of contribution and indemnity, remains undiminished, particularly because of the dissimilarities of the two remedies.²⁰ It is essential that the astute practitioner distinguish those situations where his client might successfully impose the burden of an adverse judgement on another wrongdoer from those situations where a claim for indemnity might be successfully resisted.²¹

¹⁴McNEAL, *supra* note 8, at 14.

¹⁵*Id.*

¹⁶Werner, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490 (1969).

¹⁷*Id.*

¹⁸In that year contribution between joint tortfeasors against whom a judgment had been rendered, became effective. Act of April 15, 1952, ch. 259, GEN. LAWS MISS. That provision is now codified as Miss. CODE ANN. § 335.5 (1956). For a discussion and evaluation of this contribution statute, see Allen, *supra* note 11, at 55-57.

¹⁹The early case of *Hough v. Perkins*, 3 Miss. (2 How.) 724 (1838), dealt with pleading in an action on an indemnity bond.

²⁰For a discussion of the distinctions between indemnity and contribution, see text *infra*.

²¹Davis, *supra* note 1, at 518.

III. INDEMNITY DEFINED AND DISTINGUISHED

The term "indemnity," meaning security or protection against loss or damage, is often employed in two related but different ways: (1) in the sense of giving security, as by executing a bond to secure performance; and (2) in the sense of relieving a party from liability for damage previously accrued.²² This comment concentrates on the situations referred to in the second usage.

In *Builders Supply Co. v. McCabe*²³ the Pennsylvania Supreme Court lucidly explained the basis for the right to indemnity in the following language:

The right of *indemnity* rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in *degrees* of negligence or on any doctrine of *comparative* negligence—a doctrine which, indeed, is not recognized by the common law. . . . It depends on a difference in the *character* or *kind* of the wrongs which caused the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person.²⁴

Indemnity, then, implies a primary or basic responsibility in one person, although a second is also liable with the first to the third. Discharge of the obligation by the second party leaves him with the right to secure compensation from the one who, as between themselves, is primarily liable.²⁵ There are two critical prerequisites for invocation of non-contractual indemnity. First, the damages which a prospective indemnitee seeks to shift must have been imposed on him as a result of some legal obligation to the injured person. In addition, it must appear that the claimant did not actively or affirmatively participate in the wrong.²⁶ Although the right to indemnity may spring from contract

²²41 AM. JUR. 2d *Indemnity* § 1 (1968).

²³336 Pa. 322, 77 A.2d 368 (1951). The right to indemnity is recognized by the RESTATEMENT OF RESTITUTION § 76 (1937):

A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

²⁴336 Pa. 322, 77 A.2d 368, 370 (1951).

²⁵41 AM. JUR. 2d *Indemnity* § I (1968).

²⁶*Home Ins. Co. v. Atlas Tank Mfg. Co.*, 230 So. 2d 549 (Miss. 1970).

either express or implied,²⁷ principles of equity are inherent in the doctrine which allows a shifting of a common burden to the party actually responsible for the loss. Where one party is compelled to pay damages which in fairness and good conscience ought to be paid by the wrongdoer, allowance of indemnity may be justified on the quasi-contractual theory to prevent unjust enrichment.²⁸

Perhaps because both contribution and indemnity are restitutionary which in fairness and good conscience ought to be paid by the wrongdoers, courts have frequently though mistakenly intermingled the two terms.²⁹ Even the noted jurist Learned Hand once referred to indemnity as "only an extreme form of contribution."³⁰ However, there is a marked distinction between a right of contribution, which implies an apportionment or sharing of the loss among those jointly responsible, and a right to indemnity, which implies a shifting of the entire loss to the tortfeasor primarily responsible.³¹ Contribution allows a wrongdoer who has been held liable for damages to recover from each of his co-tortfeasors a ratable portion of the total liability discharged. The goal which contribution seeks is the equalization of a common burden.³² Indemnity, on the other hand, concentrates on the character of the common liability and allows the co-tortfeasor who has discharged a common burden to recover the entire amount from the party primarily liable.³³

In those jurisdictions which afford wrongdoers the remedies of both contribution and indemnity, some confusion has arisen in determining the correct remedy.³⁴ As a general rule, where the tortfeasor's negligence concurred to cause the injury to a third person, indemnity is denied, but contribution is imposed. However, where the tortfeasor required to satisfy the common obligation is liable only vicariously or by operation of law, contribution would be inappropriate, but indemnity would be allowed.³⁵ In Mississippi, where the right to contribution is restricted to those cases in which joint judgments have been entered against the

²⁷Bush v. City of Laurel, 215 So. 2d 256 (Miss. 1968).

²⁸Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 147 (1932).

²⁹Allen, *supra* note 11, at 50.

³⁰Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951).

³¹Note, *Contribution and Indemnity Among Tortfeasors*, *supra* note 8.

³²42 C.J.S. *Indemnity* § 3 (1944).

³³Sherk, *Common Law Indemnity Among Joint Tortfeasors*, 7 ARIZ. L. REV. 59 (1965).

³⁴See Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326, 329 (1965).

³⁵Note, *Contribution and Indemnity Among Tortfeasors*, *supra* note 8, at 77-78.

joint tortfeasors,³⁶ an indemnity action may become the only remedy available to a joint wrongdoer sued individually by the injured party. Thus, even though Mississippi recognizes both remedies, the restrictive application of the right to contribution inhibits a fair and equitable distribution of the joint liability.

Contracts of suretyship and express contracts of indemnity are similar in that the purpose of each is to provide security against loss. Nevertheless, the dissimilarities of the two concepts are significant and are discussed by one noted authority³⁷ as follows:

The great difference between the two [indemnity and contribution] lies in the character of the promisee. In suretyship, the promise runs to an obligee or creditor, present or prospective. In indemnity, the promise runs to an obligor or debtor present or prospective. In suretyship the promisee has or is about to extend credit to a third person, the principal, and the promise is made to protect the promisee creditor in case the principal fails to perform. In indemnity, the promisee owes or is about to assume an obligation to a third person, the creditor, and the promisor agrees to save him harmless from loss as a result of his assuming that obligation.³⁸

The fact that the indemnitor's promise of security is made to an obligor or debtor points up another important distinction between suretyship and indemnity. Express contracts or promises to indemnify are generally not within the statute of frauds.³⁹ In contrast, contracts of suretyship, being promises to answer for the debt of another, must conform to the dictates of the statute of frauds.⁴⁰ Thus, whether an obligation is one of suretyship or indemnity may determine whether the agreement is actually enforceable.⁴¹

The promise in an indemnity contract is an original undertaking, whereas the promise in a guaranty contract is a collateral undertaking.⁴²

³⁶MISS. CODE ANN. § 335.5 (1956). Maraist & Barksdale, *Mississippi Products Liability—A Critical Analysis*, 43 MISS. L.J. 139, 191 (1972), suggests that such a restrictive approach to contribution results in a paradox in the only state which employs "pure" comparative negligence. The jury is allowed to apportion negligence and damages between the plaintiff and defendant(s), but is not allowed to apportion damages between defendants.

³⁷L. SIMPSON, *HANDBOOK ON THE LAW OF SURETYSHIP* § 17 (1950).

³⁸*Id.*

³⁹Corbin, *Contracts of Indemnity and the Statute of Frauds*, 41 HARV. L. REV. 687, 697 (1928).

⁴⁰L. SIMPSON *supra* note 37, § 39.

⁴¹*See, e.g., Love v. Dampeer*, 159 Miss. 430, 132 So. 439 (1931), where the determination of whether the contract involved was one of guaranty or one of indemnity materially affected its enforceability.

⁴²*Kochan v. American Fire & Cas. Co.*, 200 So. 2d 213 (Fla. App. 1967).

An indemnity agreement differs from a contract of guaranty in that the liability assumed is not secondary but primary. The indemnity promise is not a contract to answer for the debt, default, or miscarriage of another but to indemnify the promisee from loss owing to his contractual liability.⁴³ A contract of indemnity obligates the indemnitor to reimburse his indemnitee for loss suffered or to save him harmless from liability but never directly to perform the obligation indemnified, whereas a contract of suretyship obligates the guarantor to perform the obligation in the event the principal fails to perform.⁴⁴ Finally, while an indemnity agreement requires only an indemnitee and indemnitor, a suretyship agreement requires a surety, a principal, and a promisee or obligee.⁴⁵

IV. CATEGORIES OF INDEMNITY

For analytical purposes indemnity may be conveniently subdivided into three categories, depending on the source of the obligation: (1) express contractual indemnity, (2) implied contractual indemnity, and (3) non-contractual or common law indemnity. As a practical matter, however, the latter two categories tend to blend into one another so that in practice the distinction may become purely academic.

A. Express Contractual Indemnity

Express contractual indemnity is perhaps the most familiar and most easily applied category of indemnity. With increasing frequency, parties seeking to lessen financial liabilities are executing contracts containing specific "hold harmless" agreements, whereby one party agrees to hold another harmless from some or all claims which may arise out of performance of the contract.⁴⁶ The extent of each party's obligation with respect to such an indemnity agreement is determined from the contract according to the fundamental rules governing the requisites and validity of contracts⁴⁷ and not by reference to the independent doctrine of implied or non-contractual indemnity. Thus, as indicated

⁴³*Id.*

⁴⁴*New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 64 S.E.2d 826 (1951).

⁴⁵*Id.*

⁴⁶McKenna & Bartler, *Developments in the Law of Indemnity*, 1 THE FORUM 7 (1965) [hereinafter cited as McKenna] suggests that particularly those parties engaged in the transportation and industrial fields, highly susceptible to being designated "target defendants," utilize express indemnity clauses.

⁴⁷*Pickens-Bond Constr. Co. v. North Little Rock Elec. Co.*, 249 Ark. 389, 459 S.W.2d 549 (1970); 41 AM. JUR. 2d *Indemnity* § 13 (1968).

earlier, the promise made in an express indemnity contract is an original as opposed to a collateral undertaking, and the liability assumed is a primary one.⁴⁸

The express contract to indemnify is not restricted to the comparatively simple relationship which originates by contract between insurer and insured. Often the indemnity agreement is included as a clause in a more general contract.⁴⁹ Common examples include such a clause in the agreement between a prime contractor and his subcontractor,⁵⁰ or between an independent contractor and the owner or other party to whom he is rendering a service.⁵¹ These agreements to indemnify against future liability in negligence are not against public policy⁵² and are generally enforceable, but they will be strictly construed.⁵³ Where the parties resort to litigation for construction of express indemnity agreements, the meaning will be determined by reading the disputed clause as a whole and in context, not by isolating phrases and considering them independently.⁵⁴

Indemnity clauses in written contracts may be classified as either limited or unlimited clauses. As the title suggests, a limited indemnity clause offers incomplete protection to the party seeking insulation. Where the indemnity clause in construction contracts only obligates the subcontractor to reimburse an owner or prime contractor against the subcontractor's own negligence, no substantial protection beyond that ordinarily afforded the indemnitee under common law indemnity principles is obtained.⁵⁵ Nevertheless, an unlimited indemnity clause which purports to hold one harmless under all circumstances will normally provide complete protection.⁵⁶ Whether such a clause will protect the party seeking indemnity against his own negligence is determined by evaluating the words of the clause itself. The Mississippi Supreme Court, in adopting the majority rule in this area, made the following comment:

[S]ome courts have held that in order for an indemnitee to be indemnified against his own negligence, the indemnity contract

⁴⁸Molinari, *Implied Indemnity in California*, 8 SANTA CLARA LAW. 159, 160 (1968).

⁴⁹Furnish, *Distributing Tort Liability: Contribution and Indemnity in Iowa*, 52 IOWA L. REV. 31, 37 (1966).

⁵⁰Blain v. Sam Finley, Inc., 226 So. 2d 742 (Miss. 1969).

⁵¹Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963).

⁵²See McKenna, *supra* note 46, citing cases at 8 n.9.

⁵³United States Fid. & Guar. Co. v. Mason & Dulion Co., 274 Ala. 202, 145 So. 2d 711 (1962).

⁵⁴Liberty Mut. Ins. Co. v. North Laurel Shopping Center, Inc., 410 F.2d 96 (5th Cir. 1969).

⁵⁵McKenna, *supra* note 46, at 9.

⁵⁶*Id.*

must contain express language to that effect. However, the better rule and that which is followed by a majority of the courts is that the indemnitee will be indemnified against his own negligence when the contract shows by clear and unequivocal language that this is the intention of the parties.⁵⁷

B. Implied Contractual Indemnity

The theory of implied contractual indemnity is a relatively new category of indemnity which received little attention prior to 1956. In that year, however, the doctrine was recognized and expanded by the United States Supreme Court in *Ryan Stevedoring Co. v. Atlantic Steamship Corp.*⁵⁸ In *Ryan*, the issue was whether, in the absence of an express indemnity agreement, a stevedoring contractor was obliged to reimburse a shipowner for damages caused it by the contractor's improper storage of cargo. An employee of the stevedoring contractor had been injured in performing storage work pursuant to an informal agreement between the contractor and the shipowner. The employee recovered a judgment against the shipowner while the shipowner sought indemnity from the contractor. In allowing the indemnity claim, the Court recognized that the stevedoring contractor's agreement necessarily included an obligation not only to stow the cargo but to stow it properly and safely. The Court viewed the contractor as a warrantor of its services and granted indemnity on the basis of the implied obligation.⁵⁹ In subsequent stevedoring cases, the Supreme Court continued to ratify the concept of implied contractual indemnity.⁶⁰ However, the theory has been invoked only rarely outside the maritime field.⁶¹

Mississippi courts have not had occasion to review the *Ryan* doctrine, but the Fifth Circuit Court of Appeals, applying Mississippi

⁵⁷*Blain v. Sam Finley, Inc.*, 226 So. 2d 742, 746 (Miss. 1969).

⁵⁸350 U.S. 124 (1956).

⁵⁹In so holding, the Court used the following extremely broad language:

This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product . . . [I]t is clear that, as between themselves, the contractor as the warrantor of its services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. [*Id.* at 133-35].

⁶⁰*Crumady v. Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958). For a discussion of the *Ryan* doctrine, see Comment, *The Ryan Doctrine: Present Statute and Future Development*, 37 TUL. L. REV. 786 (1963).

⁶¹See McKenna, *supra* note 46, at 15-20 for a detailed discussion of the ramifications of the *Ryan* doctrine outside of the maritime area.

law, has refused to extend the *Ryan* doctrine outside of the maritime field. In *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*,⁶² in deciding whether to allow indemnity on an implied contractual indemnity theory, the court found no justification for allowance of the claim in Mississippi law. This conclusion was stated in the following colorful language:

In short, *Ryan* was conceived as an admiralty concept, and its explicatory progeny have not denied its paternal thesis. We find nothing in the wake of *Ryan* to lead us to apply its principles to landlubbers. It is abundantly clear that no tributary of *Ryan* reaches the Brookhaven Oil Field in Lincoln County, Mississippi, which is many miles inland from both the Mississippi River and the Gulf of Mexico. Consequently, in deciding this issue we cannot distill Mississippi law through a federal sieve; we must completely abandon the admiralty domain and repair to Mississippi's inland terrain. Looking solely to Mississippi's independent jurisprudence, we are unable to find any authority clearly indicating that Mississippi recognizes a *Ryan*-type implied contract of indemnity. . . . Accordingly we must conclude that Monsanto is not entitled to indemnity on the basis of its contract theory.⁶³

Whether the Mississippi courts would follow the restrictive approach of the Fifth Circuit Court of Appeals with regard to implied contractual indemnity is an open question. The broad language utilized by the United States Supreme Court suggests a more liberal application. In any event, the theory will undoubtedly have particular appeal for imaginative counsel seeking indemnification in situations where it would otherwise be prohibited.

C. Non-contractual or Common Law Indemnity

The third category of indemnity, non-contractual or common law indemnity, offers the most interesting if not the most confused applications of indemnity principles.⁶⁴ In contrast to the types of indemnity previously discussed, common law indemnity is not founded in contract, but traces its historical background to principles of tort law and

⁶²420 F.2d 1103 (5th Cir. 1970).

⁶³*Id.* at 1111.

⁶⁴Davis, *supra* note 1, at 536 laments:

It is a good deal easier to list cases in which indemnity has or has not been allowed than it is to make sense out of them. It is well nigh impossible to work all of the indemnity cases into a consistent whole, and the language which the courts have employed in explaining their indemnity decisions is bewildering, to say the least.

equitable considerations of unjust enrichment and restitution. The critical inquiry in common law indemnity situations is to the quality or character of fault attributable to each joint tortfeasor. In comparing the relative character of the fault of the party seeking indemnity with the party resisting indemnity, the majority of courts grant reimbursement to the tortfeasor whose negligence is denominated merely "passive or imputed, secondary or negative" as opposed to the tortfeasor whose negligence is designated "active, primary or positive."⁶⁵ It has been suggested that the doctrine which allows indemnity to the passive wrongdoer may have originated from the common law theory which considered misfeasance to be a greater wrong than nonfeasance.⁶⁶ As a practical matter, however, application of this test enables a court to circumvent the remaining vestiges of the common law rule prohibiting contribution and indemnity between tortfeasors and to impose ultimate liability on the tortfeasor whose principal negligence caused the original loss.⁶⁷

But the active-passive test for allowance or disallowance of common law indemnity is much easier to state than to apply consistently.⁶⁸ Cases which have dealt with the question of non-contractual or common law indemnity present a confusing picture, and the active-passive test has often been criticized.⁶⁹ Much of the confusion stems from the failure of courts to define active or passive negligence in such a way as to establish effective guidelines for future litigants.⁷⁰

⁶⁵Home Ins. Co. v. Atlas Tank Mfg. Co., 230 So. 2d 549 (Miss. 1970); 41 AM. JUR. 2d Indemnity § 20 (1968); Davis, *supra* note 1, at 543-44 lists the following variations of the basic test:

"constructive" and "actual" negligence, "party immediately in fault," "positive tort" and "primary and efficient cause," "primary and active wrongdoer," "principal delinquent," "primary cause," "real cause," "principal and moving cause," "the wrongdoer in the physically participative sense and the wrongdoer in the legally relative sense," "concurrent or joint tort-feasors as distinguished from related tort-feasors," "active wrongdoer or primarily negligent party."

⁶⁶W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51 (4th ed. 1971).

⁶⁷McKenna, *supra* note 46, at 22.

⁶⁸See, e.g., Thornton & McNiece, *Torts and Workmen's Compensation*, 32 N.Y.U.L. REV. 1465, 1471 (1957):

When the judges of the appellate courts disagree so violently in these indemnity cases, a trial judge may well be pardoned if he too guesses wrong now and then. Indeed, in deciding what negligence is "active" and what is "passive," a trial judge will receive almost as much assistance from tossing a coin as he will from pondering the opinion of the appellate tribunals.

⁶⁹Davis, *supra* note 1, at 539-44; Leflar, *supra* note 28, at 156; Comment, *Indemnity Among Joint Tortfeasors in New York: Active and Passive Negligence and Impleader*, 28 FORDHAM L. REV. 782, 787 (1960).

⁷⁰McKenna, *supra* note 46, at 22.

The Mississippi Supreme Court recently confronted the problem of determining the quality of negligence attributable to concurrent tortfeasors in a non-contractual indemnity action. In *Home Insurance Co. v. Atlas Tank Manufacturing Co.*,⁷¹ an employee of Atlas had been electrocuted while operating a piece of machinery beneath the 13,000-volt utility distribution line owned by Mississippi Power and Light Company. After settlement with the heirs of the deceased, MP&L and its insurer, the Home Insurance Company of New York, sued Atlas to recover indemnity. The proof indicated that Atlas had begun filling and leveling the area beneath the line and had notified MP&L that as a consequence the line had become dangerously low. Nevertheless, Atlas continued to stack butane tanks beneath the line after MP&L had advised that no work be done in the area. The chancellor found that a reasonable effort was made by Atlas to have the line elevated and denied the indemnity claim, ruling that because MP&L had knowledge of the danger, failure to take remedial steps was active and not passive negligence. The Mississippi Supreme Court affirmed the chancellor's findings, categorizing the negligence of Atlas as "virulent" and that of MP&L as "gross negligence." The court held that where the joint tortfeasors were *in pari delicto* there could be no indemnity recovery.⁷²

Although the result in the *Home Insurance Co.* case rather dramatically indicates the inequities in not allowing contribution between concurrent tortfeasors,⁷³ the decision is nonetheless correct in terms of indemnity principles. But the case also demonstrates the problem of utilizing such a vague and indefinite test in determining whether to permit indemnity in non-contractual or common law indemnity cases. Perhaps unintentionally, the court in the *Home Insurance Co.* case specifically articulates the problem of employing the word formula test where it stated the issue:

Was the admitted negligence of the appellant active, primary, or positive or was it passive, secondary, or negative? These words are the designations universally used to differentiate the indemnifiable from the non-indemnifiable types of negligence.⁷⁴

The opinion appears unsatisfactory in that no attempt is made to define the critical terms in such a way as to suggest definite criteria for the disposition of future non-contractual indemnity cases. In

⁷¹230 So. 2d 549 (Miss. 1970).

⁷²*Id.* at 554.

⁷³For a thorough discussion of the problem in Mississippi and a recommended solution, see Allen, *supra* note 11, at 57-59.

⁷⁴230 So. 2d 549, 551 (Miss. 1970).

actuality, the court did no more than to recount the stipulated and disputed facts and to categorize these facts as establishing active negligence on the part of both litigants, thereby precluding indemnity. In cases where such a judicial attitude is apparent, it has been suggested that the mere phrasing of the issue or the description of the negligence can be determinative under the active-passive formula for non-contractual indemnity.⁷⁵

In spite of the confusion which the non-contractual or common law indemnity situations have produced, it is possible to classify the cases in which the party seeking indemnity has been successful in having his actions termed passive or secondary, thus enabling him to recover indemnity. Generally, common law indemnity has been permitted in at least three broad categories of cases: (1) in cases where liability is imposed without fault; (2) in cases where liability is imposed for breach of a non-delegable duty; and (3) in cases where liability is imposed on concurrent tortfeasors.

1. Liability Without Fault

The most desirable cases for allowance of common law indemnity and those in which this category of indemnity is most frequently allowed are those where the negligent or wrongful act of one person causes the injury, but the law permits the injured person to recover from someone other than the wrongdoer. In these cases the party liable without fault may recover indemnity from the actual wrongdoer.⁷⁶

There are several different situations where indemnity is permitted by an indemnitee whose liability to an injured third party is based merely on negligence imputed to him. A common example of liability without fault or liability based upon imputed negligence is where a master is vicariously liable for the damage caused by a servant acting within the scope of his employment under the doctrine of respondeat superior.⁷⁷ In these situations indemnity is universally allowed.⁷⁸ Thus,

⁷⁵Davis, *supra* note 1, at 542.

⁷⁶Comment, *Contribution and Indemnity Among Joint Tortfeasors*, *supra* note 3, at 186 (1966).

⁷⁷53 AM. JUR. 2d *Master and Servant* § 404 (1970); RESTATEMENT (SECOND) OF AGENCY §§ 219, 243 (1958); *see, e.g.*, *Todd v. Natchez-Eola Hotels Co.*, 171 Miss. 577, 157 So. 703 (1934).

⁷⁸*But cf.* Note, *D.W. Boutwell Butane Co. v. Smith—Employee Exoneration with Employer Liability—An Anomaly*, 42 Miss. L.J. 515 (1970), which suggests that imposition of liability upon an employer solely because of a tort committed by his employee where the employee is exonerated is a misapplication of the doctrine of respondeat superior. Such a result in effect precludes the employer from obtaining

a master who has been obligated to make compensation to a third party through the sole wrong of the servant may recover indemnity from the servant.⁷⁹ Where the indemnitee is directed or employed by another to do an act not manifestly wrong and is held liable to a third person as a result, he may recover indemnity from the employer.⁸⁰ Under the same rationale, a principal is allowed indemnity from his agent where the principal is held liable to another for the negligent acts of the agent solely on the basis of the agency.⁸¹ In these cases, the indemnitee has typically been liable without fault. However, indemnity is not granted by virtue of the agency relationship alone.⁸² Where the principal is found to have been actively negligent and not merely negligent solely by imputation, indemnity has been denied.⁸³ In addition, where the owner of an automobile is vicariously liable to a third party for the negligence of the driver, the owner is permitted to recover indemnity against the driver.⁸⁴ In these cases the technically or vicariously negligent owner is entitled by way of common law indemnity to reimbursement from the actively negligent driver.⁸⁵

The same principle applies in any case where the one seeking indemnity has been held liable, not because of any personal fault, but because of a duty imposed by law on the basis of his relationship to another which makes him responsible for the negligence of another.⁸⁶ Beyond the well-defined master-servant or principal-agent relationships a contractor not personally at fault may recover indemnity from his subcontractor whose negligent acts caused the loss.⁸⁷

indemnity from the negligent employee since under Mississippi law, exoneration of the employee is *res judicata* to the action for indemnity. *See also* *Central Sur. & Ins. Corp. v. Mississippi Export Ry.*, 91 F.2d 125 (5th Cir. 1937); Note, *D.W. Boutwell Butane Co. v. Smith—Employee Exoneration with Employer Liability—An Anomaly*, *supra*, at 523 n.56.

⁷⁹*Granquist v. Crystal Springs Lumber Co.*, 190 Miss. 572, 1 So. 2d 216 (1941); 41 AM. JUR. 2d *Indemnity* § 22 (1968).

⁸⁰*Leflar, supra* note 28, at 150. Thus, where a contractor in good faith built a bridge as directed by the city, he was entitled to indemnity for damages for trespass because the city had not acquired title to the land. *Horrabin v. City of Des Moines*, 198 Iowa 549, 199 N.W. 988 (1924).

⁸¹*Herrero v. Atkinson*, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (Dist. Ct. App. 1964); *Granquist v. Crystal Springs Lumber Co.*, 190 Miss. 572, 1 So. 2d 216 (1941).

⁸²Note, *Contribution and Indemnity Among Tortfeasors, supra* note 31, at 78 n.68 citing *William F. Larrick, Inc. v. Burt Chevrolet, Inc.*, 147 Colo. 133, 362 P.2d 1030 (1961).

⁸³*Id.*

⁸⁴*Hertz Corp. v. Richards*, 224 So. 2d 784 (Fla. App. 1969).

⁸⁵*Roth v. Cannel*, 242 So. 2d 491 (Fla. App. 1970).

⁸⁶*Davis, supra* note 1, at 519.

⁸⁷*E.g., Bowyer & Johnson Constr. Co. v. White*, 255 F.2d 482 (5th Cir. 1958).

2. Non-Delegable Duty

A second broad category of cases wherein non-contractual or common law indemnity is allowed involves situations where liability is imposed on one party for violation of a non-delegable duty, while another party was actually responsible for the injury or damage. This class of cases, although analagous to those where liability is imposed without fault, is distinguishable on the basis that the indemnitee's culpability here is predicated upon his breach of the non-delegable duty involved.⁸⁸ Municipalities assume a non-delegable duty to maintain streets and sidewalks in reasonably safe condition.⁸⁹ In *Bush v. City of Laurel*⁹⁰ the municipality recovered indemnity from a contractor for amounts paid in settlement of a claim by a pedestrian injured on a sidewalk under construction. While the city's liability was based exclusively on its non-delegable duty, the contractor was actively responsible for the cause of the injury. Thus, the city was not *in pari delicto* with the contractor and indemnity was deemed proper.⁹¹

A similar situation exists where a land owner is held liable for breach of his duty to maintain his premises in a reasonably safe condition for persons invited, expressly or impliedly, to enter thereon.⁹² The land owner is entitled to indemnity from the party actually creating the dangerous condition which precipitates the harm, unless the land owner had discovered the condition and failed to alleviate it.⁹³

In products liability litigation, courts apply the non-delegable duty rationale to indemnify one who becomes liable to another through the use of a defective product.⁹⁴ Typically, the indemnitee is liable

⁸⁸Hodges, *supra* note 2, at 155.

⁸⁹Indemnity cases of this type are so numerous that at least one writer treats them as an entirely separate category. See Davis, *supra* note 1, at 524.

⁹⁰215 So. 2d 256 (Miss. 1968).

⁹¹*Id.* and cases cited at 260.

⁹²RESTATEMENT OF RESTITUTION § 95 (1937) states:

Where a person has [become] liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.

⁹³*Busy Bee Buffet v. Ferrell*, 82 Ariz. 192, 310 P.2d 817 (1957), discussed in Sherk, *supra* note 33, at 69-70.

⁹⁴3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 44.02(1) (1970); Sherk, *supra* note 33, at 63-64 & n.23 citing *Crouse v. Wilbur-Ellis Co.*, 77 Ariz. 359, 272 P.2d 352 (1954). See also Annot., 28 A.L.R.3d 943 (1969).

merely for breaching some positive duty owed to the injured party, though the indemnitor actually created the original risk which caused the harm.⁹⁵

Cases where the indemnitee's liability is imposed solely for his failure to discover the dangerous condition which the indemnitor created are closely akin to the non-delegable duty cases because of the great disparity in culpability between the indemnitor and indemnitee. In *Central Surety & Insurance Corp. v. Mississippi Export Railway*,⁹⁶ the Fifth Circuit Court of Appeals restated the applicable Mississippi law in this area:

It is true in Mississippi as in other common law jurisdictions that without statutory aid joint tort-feasors being in *pari delicto* cannot force contribution among themselves. . . . But it is also established that, where there is no joint action by the two persons in causing an injury and no *par delictum*, but there is wrongful conduct by one which creates a danger which results in injury and the liability of the other rests only on a failure to discover or remedy the dangerous condition, the latter may often have indemnity from the former when held liable to the person injured.⁹⁷

However, where the prospective indemnitee's acquiescence in the dangerous condition is indicated by continued awareness of its existence without taking corrective measures or requiring the indemnitor to do so, indemnity will not be permitted.⁹⁸

3. Concurrent Negligence

This category of non-contractual indemnity cases presents the most difficult factual situations. Included here are the unusual cases in which the equities of the situation might require indemnity, though the loss occasioned by the concurrent negligence might better be distributed by allowing contribution. The much discussed Tennessee case of *Cohen v. Noel*⁹⁹ furnishes an excellent example. In that case, an employee of a public garage owner was injured when an automobile struck the ladder on which he was working. After settlement with the injured employee, the automobile owner sought indemnity from the garage

⁹⁵Comment, *Contribution and Indemnity Among Joint Tortfeasors*, *supra* note 3, at 186.

⁹⁶91 F.2d 125 (5th Cir. 1937).

⁹⁷*Id.* at 126.

⁹⁸*Pennsylvania R.R. v. Erie Ave. Warehouse Co.*, 302 F.2d 843 (3d Cir. 1962);

41 AM. JUR. 2d *Indemnity* § 17 (1968).

⁹⁹165 Tenn. 600, 56 S.W.2d 744 (1933).

owner. The Tennessee Supreme Court, applying the active-passive test, allowed indemnity to the "passively" negligent automobile owner from the garage owner deemed "actively" negligent for maintaining a dimly lighted garage.¹⁰⁰

It is difficult to explain such an ironic result. The facts presented a close case of concurrent negligence and the court, confronting the semantic problems of the active-passive formula, produced a strained application. In the *Cohen* case, as well as the *Home Insurance Co.* case, it seems that contribution would have been the more appropriate remedy. If contribution were allowed in all situations where both tortfeasors were concurrently negligent rather than just in those cases where a joint judgment had been entered against them, non-contractual indemnity could be restricted to the categories discussed earlier.¹⁰¹ Perhaps this solution would better effectuate the goals of both remedies in equitably distributing a mutual liability.

V. GENERAL CONSIDERATIONS

A. Other Tests

The continuing inability of some courts to agree on the common factual content of the various terms used in the familiar active-passive formula has tempted commentators to suggest new tests and some jurisdictions to modify or abandon the old standard. Texas, for example, has discarded the active-passive test in favor of one which concentrates on the quality of the duties existing between the tortfeasors.¹⁰² One writer has articulated this test in the following way:

Where the plaintiff's injuries are caused by the negligence of both tortfeasors, but one tortfeasor also breaches a duty to the other, then the tortfeasor who breaches no similar duty is entitled to indemnity. If there are joint tortfeasors who are in *pari delicto* and neither breaches a duty toward the other, contribution is the appropriate remedy.¹⁰³

Another writer has suggested that the better rationale would be to examine the disproportionate duties owed by the tortfeasor to the injured party.¹⁰⁴ Where the duties owed to the injured party are

¹⁰⁰*Id.* at 746.

¹⁰¹*E.g.*, Comment, *Contribution Among Joint Tortfeasors*, *supra* note 34, at 329.

¹⁰²*E.g.*, *Humble Oil & Ref. Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949); *Wheeler v. Glazer*, 137 Tex. 341, 153 S.W.2d 449 (1941); *Hodges*, *supra* note 2, at 162.

¹⁰³Comment, *Contribution Among Joint Tortfeasors*, *supra* note 34 at 329.

¹⁰⁴*Davis*, *supra* note 1, at 546.

approximately equal, the case may properly be one for contribution. Where the duties are disproportionate and the difference is enough to warrant a complete shifting of the loss, indemnity should be allowed.¹⁰⁵ It has also been proposed that joint tortfeasors be separated into technical, concurrent, and intentional classifications and indemnity awarded on the basis of this classification.¹⁰⁶

Close scrutiny of these proposals, however, reveals that they are in effect only variations of the classic active-passive formula, complete with the same semantic difficulties and ambiguities. All of these proposals essentially provide indemnity where there is a difference in the gravity or character of the fault between the joint tortfeasors. This same result is realized by application of the active-passive formula. Perhaps the better solution would be for the courts, in applying the active-passive test, to articulate with more specificity the factual criteria relied upon in denominating negligent conduct as either active or passive.

B. Indemnity Disallowed

Since indemnity requires a primary responsibility on the part of the indemnitor, no recovery will be allowed where the fault of each joint tortfeasor is determined to be equal in grade or similar in character.¹⁰⁷ Thus, in cases where the parties are found to be *in pari delicto*, no adjustment of the liability is permitted.¹⁰⁸ In addition, for indemnity to be permitted it must appear that the claimant seeking to shift the damages paid the injured party as a result of some legal obligation and under compulsion. In *Southwest Mississippi Electric Power Association v. Harragill*,¹⁰⁹ the power association sought indemnity from the truck dealer and welding company after settling the claim of an automobile operator injured when the power truck's brakes failed. The power association alleged that it had purchased the truck requesting that it be equipped with electric brakes, that the installation of the brakes was defective, and that reasonable inspection and maintenance had failed to uncover the defect. The court denied indemnity, holding that the proof indicated that the power association would not

¹⁰⁵*Id.* at 546-47.

¹⁰⁶Comment, *Contribution and Indemnity Among Joint Tortfeasors*, *supra* note 3, at 209-10.

¹⁰⁷*Home Ins. Co. v. Atlas Tank Mfg. Co.*, 230 So. 2d 549 (Miss 1970).

¹⁰⁸*Id.* at 554.

¹⁰⁹254 Miss. 460, 182 So. 2d 220 (1966).

have been liable to the injured party and that the settlement was a voluntary undertaking.¹¹⁰ Similarly, no indemnification can be recovered by a person cast in judgment against a third party if the party cast had a defense available against an injured person but failed to assert it.¹¹¹

Various other special circumstances may exist which preclude indemnity. Suit may not be brought by a creditor of the indemnitee against the indemnitor directly until the liability of the indemnitee has been established.¹¹² A prime contractor who terminates a subcontract and directs subcontract work becomes the employer of the former subcontractor's employees. In such a situation the contractor is precluded from recovering indemnification from the former subcontractor for settlements in a workman's death.¹¹³

The exclusive remedy provision of many workmen's compensation statutes prevents a third party, held liable to an employee, from recovering indemnity from the employer on a tort theory.¹¹⁴ Section 6998-05 of the Mississippi Code¹¹⁵ sets forth the remedial exclusivity of the action in Mississippi. That section reads in part:

The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death.¹¹⁶

Although no Mississippi case has passed precisely on the question of whether the exclusive remedy provision precludes a third party's indemnity claim against the employer, the Fifth Circuit Court of Appeals, "surrogating for Mississippi until it speaks authoritatively," held that the exclusive liability provision of the statute would "stand as a Horatio at the bridge" to bar such an indemnity claim.¹¹⁷

¹¹⁰*Id.* at 468, 182 So. 2d at 223.

¹¹¹*Jones v. Wright*, 258 So. 2d 195 (La. App. 1972).

¹¹²*Gully v. First Nat'l Bank*, 183 Miss. 385, 184 So. 615 (1938).

¹¹³*C.H. Leavell & Co. v. Doster*, 233 So. 2d 775 (Miss. 1970).

¹¹⁴*Davis*, *supra* note 1, at 534.

¹¹⁵MISS. CODE ANN. § 6998-05 (1956).

¹¹⁶*Id.*

¹¹⁷*Smith Petro. Serv., Inc. v. Monsanto Chem. Co.*, 420 F.2d 1103, 1112 (5th Cir. 1970).

C. Procedural Matters

In Mississippi, claims for indemnity have been brought both in chancery¹¹⁸ and circuit¹¹⁹ courts. But indemnity claims are unnecessarily hindered in Mississippi courts by an incomplete procedure which does not provide third party practice.¹²⁰ Failure to allow third party actions encourages both delay and a multiplicity of actions. It is hoped that a procedural device, allowing third party practice and disposition of all claims in one action, will soon be available in Mississippi practice.

Before an indemnitee can maintain a claim for indemnity, he must have suffered an actual loss.¹²¹ In Mississippi practice, the party seeking indemnity may proceed either in contract or tort but not in both theories in the same suit.¹²²

The general rule regarding the measure of damages allows the indemnitee to recover that amount actually expended by the indemnitee as a consequence of the indemnitor's actions.¹²³ As a necessary part of his damages, the indemnitee may recover reasonable attorney's fees, expenses including court costs, interest, and the cost of an unsuccessful appeal when taken with the indemnitor's authority.¹²⁴

VI. CONCLUSION

Indemnity is a viable remedy available to a joint tortfeasor required to satisfy a joint responsibility in a variety of situations. The extent to which implied contractual indemnity will be recognized in Mississippi remains unresolved. Nevertheless, in view of the restrictive approach taken by the Fifth Circuit Court of Appeals, the remedy of implied contractual indemnity may be all but foreclosed in Mississippi.

Although the active-passive test for determining whether to allow non-contractual or common law indemnity has been criticized, the classic formula is essentially the same type of test as the suggested

¹¹⁸*E.g.*, *Home Ins. Co. v. Atlas Tank Mfg. Co.*, 230 So. 2d 549 (Miss. 1970).

¹¹⁹*E.g.*, *C.H. Leavell & Co. v. Doster*, 233 So. 2d 775 (Miss. 1970).

¹²⁰*See Security Mut. Life Ins. Co. v. Brunson*, 176 Miss. 893, 170 So. 824 (1936).

¹²¹*B & G Elec. Co. v. G.E. Bass & Co.*, 252 F.2d 698 (5th Cir. 1958); *United Gas Corp. v. Guillory*, 206 F.2d 49 (5th Cir. 1953); 41 AM. JUR. 2d *Indemnity* § 32 (1968).

¹²²*Nasif v. Booth*, 221 Miss. 126, 72 So. 2d 440 (1954).

¹²³42 C.J.S. *Indemnity* § 24 (1944).

¹²⁴*Bush v. City of Laurel*, 215 So. 2d 256 (Miss. 1968). Attorney's fees incurred by a prime contractor in successfully defending a suit by the subcontractor's employee were recovered by the prime contractor by way of indemnity in *B & G Elec. Co. v. G.E. Bass & Co.*, 252 F.2d 698 (5th Cir. 1958).

substitutes. A conscientious judicial effort to define the factual content of the terms utilized in the active-passive formula and its variations would serve to alleviate much of the confusion surrounding indemnity situations.

In Mississippi, procedural reform allowing some type of third party practice is necessary to prevent a multiplicity of suits and the consequent delays where indemnity situations are concerned. In addition, the right to contribution should be extended in order to enable the restitutionary devices of indemnity and contribution to insure a fair distribution of a joint liability.

Thomas M. Murphree, Jr.

LEGAL MALPRACTICE IN MISSISSIPPI

I. INTRODUCTION

Courts, being themselves made up of lawyers, historically¹ have been reluctant to hold attorneys liable for negligence to their clients.² In England, for example, barristers were not liable for negligence to a client³ because there was no privity between the barrister and the litigant (the solicitor being an intermediary because of England's bifurcated bar). Today, however, it seems likely that the widespread use of malpractice insurance by attorneys will temper the reluctance of judges to find their brethren at the bar liable for malpractice. Other pressures may be generated by public dissatisfaction with the legal profession as evidenced in books such as *The Trouble With Lawyers*.⁴ Thus it is apparent that Mississippi attorneys should have some understanding of Mississippi decisions in this area of the law and how they could be potentially affected.

Negligent acts by an attorney which constitute actionable malpractice,⁵ i.e., a breach of duty owed to a client or a third party which gives rise to a right of action for damages, will be discussed in this comment. Such negligent acts are to be distinguished from other forms of attorney misconduct or attorney-client disagreements such as: (1) champerty and maintenance⁶ which constitute the criminal offense of stirring up litigation, (2) unethical conduct⁷ for which the penalty may be reprimand,⁸ suspension⁹ or disbarment¹⁰ in an action before the

¹See Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959).

²An apparent example of the reluctance of a trial judge to allow a malpractice suit against an attorney is *Solomon v. Meyer*, 89 So. 2d 865 (Fla. 1956), and *Solomon v. Meyer*, 116 So. 2d 34 (Fla. App. 1959). The trial judge initially dismissed the client's complaint and was reversed by the Supreme Court of Florida. 89 So. 2d 865 (Fla. 1956). Subsequently the trial judge granted summary judgment to the attorney, and the Florida Court of Appeals reversed, ordering a trial for the client. 116 So. 2d 37 (Fla. App. 1959).

³Wade, *supra* note 1, at 755.

⁴M. BLOOM, *THE TROUBLE WITH LAWYERS* (1968).

⁵See generally Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225 (1958); Leavitt, *The Attorney as Defendant*, 13 HASTINGS L.J. 1 (1961); Wade, *supra* note 1; Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292 (1963); Annot., 45 A.L.R.2d 5 (1956).

⁶MISS. CODE ANN. §§ 2049-01 to -08, 8683, 8684 (1956).

⁷See generally AMERICAN BAR ASS'N, *CODE OF PROFESSIONAL RESPONSIBILITY* (1969).

⁸MISS. CODE ANN. § 8713 (1956).

⁹*Id.* § 8712.

¹⁰*Id.* § 8711.

chancery courts in Mississippi, (3) disputes over rights to, or the legality of, fees (such as under contingency fee contracts¹¹), and (4) fraudulent acts or violations of the fiduciary aspect of the attorney-client relationship¹² such as an attorney dealing with a client's property for his own benefit when he has a duty to protect the client's interest. The major emphasis of this comment will be upon Mississippi case law dealing with legal malpractice; however, in areas of interest where Mississippi Supreme Court decisions are lacking, the law of other jurisdictions will be discussed.

II. THE STANDARD OF CARE REQUIRED OF AN ATTORNEY

In the early case of *Fitch v. Scott*,¹³ the Mississippi Supreme Court stated that an attorney has a duty to use a "reasonable degree of care, skill and despatch (sic)" and that there must be "gross negligence or ignorance" for there to be liability of an attorney to his client. However, in *Thompson v. Erving's Hatcheries, Inc.*,¹⁴ its most recent pronouncement on this subject, the Mississippi Supreme Court indicated that the test was not whether there was gross negligence on the part of the attorney, but merely whether there was a failure to exercise reasonable care, skill and knowledge. The court stated:

While occasional language may be found, especially in the earlier cases, suggesting that an attorney is liable to his client for the conduct of litigation only where he is chargeable with gross negligence or want of skill, it appears to be the presently well-settled rule in most if not all of the American jurisdictions in which the question has arisen that an attorney to whom the conduct of litigation may be held liable to his client for damages resulting from his failure to exercise ordinary care, skill, and diligence, or, as it is frequently expressed, that degree of care,

¹¹*E.g.*, *Pocius v. Halvorsen*, 30 Ill. 2d 73, 195 N.E.2d 137 (1964); *Bounougias v. Peters*, 49 Ill. App. 138, 198 N.E.2d 142 (1964); Annot., 13 A.L.R.3d 673 (1967); Annot., 13 A.L.R.3d 701 (1967); Annot., 77 A.L.R.2d 411 (1961).

¹²The attitude with which courts approach such dealings between attorney and client is illustrated by our court's statement in *Gwin v. Fountain*, 159 Miss. 619, 126 So. 18 (1930):

[D]ealings between an attorney and his client are held as against the attorney to be prima facie fraudulent, and the attorney, in order to sustain such a transaction which is advantageous to him, has the burden of showing, not only that he used no undue influence, but that he gave his client all the information and advice which it would have been his duty to give if he, himself, had not been interested. [*Id.* at 645, 126 So. at 22.]

¹³4 Miss. (3 How.) 314 (1839).

¹⁴186 So. 2d 756 (Miss. 1966).

skill, and diligence which is commonly possessed and exercised by attorneys in practice in the jurisdiction.¹⁵

The court alludes to a locality rule for degree of care required of attorneys just as there is a locality rule¹⁶ for physicians, but no decisions of the Mississippi Supreme Court have ever turned upon this point regarding attorneys. One reason for this is probably that the Mississippi Supreme Court has never required the plaintiff to put on expert testimony¹⁷ in order to make a prima facie case against a lawyer for negligent performance of his duties.

An attorney may also be liable for negligence although he adhered to the customary practice of attorneys in his locality.¹⁸ *Gleason v. Title Guarantee Co.*¹⁹ involved a situation in which an attorney gave an opinion that title to certain property was clear and certified that he had made "a personal examination of all public records." The title was not clear, however, and the attorney in reality relied upon an examination by an abstractor. Despite a showing that the attorney had followed the customary local practice, the Fifth Circuit Court of Appeals found that he had been negligent and stated: "No degree of antiquity can give sanction to a usage bad in itself."²⁰ In *Gleason* the attorney involved was really guilty of a nonfeasance rather than a malfeasance, and it could be argued that an action in contract for breach of an implied warranty was the proper remedy rather than an action in tort. This could be significant in that some courts have found strict liability for the breach of an implied warranty in performing personal

¹⁵*Id.* at 757, quoting Annot., 45 A.L.R.2d 5, 11-12 (1956).

¹⁶In states that mention locality, it is statewide in effect. For example, the Supreme Court of Washington in *Cook, Flanagan & Berst v. Clausines*, 73 Wash. 2d 393, 438 P.2d 865 (1968) stated: "The standards of practice in this jurisdiction as a qualification for the practice of law are the same throughout the state, and do not differ in its various communities." *Id.*, 438 P.2d 866. The state of Washington abolished the locality rule for physicians in *Douglas v. Bussabarger*, 73 Wash. 2d 829, 438 P.2d 476 (1968).

¹⁷Wade, *supra* note 1, at 766 states: "No such requirement [of expert testimony] appears to have developed in actions against attorneys." But in at least one jurisdiction expert testimony is required to make a prima facie case. *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1962).

¹⁸This is reminiscent of the products liability doctrine that a company can be negligent in failing to do something that no one in the industry has ever done. See *Marsh Wood Products Co. v. Babcock & Wilcox Co.*, 207 Wis. 209, 240 N.W. 392 (1932).

¹⁹300 F.2d 813 (5th Cir. 1962) (applying Florida law).

²⁰*Id.* at 814, quoting *Leach v. Three of the King's Messengers*, 19 How. St. Trials 1027 (1765).

services.²¹ It could also be important where the statute of limitations for contract is longer than that for tort.²²

III. WHAT PROOF IS REQUIRED OF A PLAINTIFF?

Proof of negligence by an attorney is only one of the elements necessary for the prosecution of a malpractice action; it must also be shown that damages resulted and that the attorney's negligence was the proximate cause of the loss.

Thus if an attorney were to allow the running of the statute of limitations to bar his client's action, in a subsequent malpractice action the client would have to prove that he would have won his original suit, for otherwise he would have suffered no real damages. As a practical matter, this means that he must try his original action as a part of the malpractice action.²³ The Mississippi Supreme Court in *Thompson v. Erving's Hatcheries, Inc.*²⁴ found that the attorney had been guilty of negligence in allowing the statute of limitations to bar his client's action on an open account. Nevertheless, the court remanded the case for a retrial on the issue of damages indicating that besides proving negligence on the part of the attorney, the client must prove (1) that he was entitled to a judgment in his original action which had become barred and (2) that such a judgment would have been collectible, *i.e.*, that the client's debtor was solvent.²⁵ To the same effect is the holding in *Hoover v. Shackelford*.²⁶

The plaintiff should have proved that the makers of the note, which defendant undertook to collect, were able to pay it, or some part thereof; and that a failure to collect resulted from the gross negligence of the defendant.²⁷

*Fitch v. Scott*²⁸ illustrates one method of proving the solvency of a debtor. In *Fitch* the attorney was negligent in failing to file suit at the first term of court as directed by his client. By the next term of court the debtor was insolvent; however, the client had the sheriff

²¹See *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 196 N.W.2d 316 (Mich. Ct. App. 1972); *Newmar v. Gimbel's Inc.*, 54 N.J. 585, 258 A.2d 697 (1969); *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 867 (1970).

²²See section IV (A) *infra*.

²³For a discussion of this point see Coggin, *supra* note 5.

²⁴186 So. 2d 756 (Miss. 1966).

²⁵After retrial on these two issues the client again appealed and the supreme court rendered a verdict in his favor. 204 So. 2d 188 (Miss. 1967).

²⁶23 Miss. 520 (1852).

²⁷*Id.* at 521.

²⁸4 Miss. (3 How.) 314 (1839).

testify that during the previous term of court he had "made money on" (presumably this means collected) all executions returned against the debtor. So, proof of damages requires a showing that (1) a judgment would have been achieved and (2) the judgment would have been collected in whole or in part.

Similar standards are applied in cases where the right of appeal has been lost due to an attorney's failure to file a timely notice of appeal. In such a situation the client must prove negligence *and* that the case would have been reversed on appeal because the client would have sustained no damage if the judgment would have been affirmed. The California District Court of Appeals in *Pete v. Henderson*²⁹ stated this proposition as follows: "[A] plaintiff in such a case must plead and prove that the appeal, had it been taken, would have resulted in a reversal."³⁰

Only two cases have been found where damages were awarded for failure to take a timely appeal. In *McAleenan v. Massachusetts Bonding and Insurance Co.*³¹ recovery was allowed, but the defendant's argument that no damages had been proved was ignored by the New York Court of Appeals on the grounds that damages had been found as a matter of fact by the trial court. In *Drais v. Hogan*³² the attorney obtained an order for a new trial, but that order was reversed³³ upon appeal as the attorney had failed to follow the statutory procedure in making such a motion. He had assured his clients that an appeal was unnecessary; however, the California Supreme Court indicated that an appeal should have been taken from the judgment itself since the complaint was fatally defective:

[T]he grossest mismanagement after all is found in his failure to appeal the judgment itself. The complaint . . . upon which the judgment against Lucinda Drais was founded was radically defective and wholly insufficient to support the judgment . . . in this view it was inexcusable in the defendant to have permitted the time limited by statute for an appeal from the judgment itself to pass away, and so to allow the rights of the defendant in that action to become lost in the abortive attempt to obtain a new trial, when such new trial, even if it had been obtained, was not necessary for her probation under the circumstances.³⁴

²⁹124 Cal. App. 2d 487, 269 P.2d 78 (1954).

³⁰*Id.*, 269 P.2d at 80.

³¹232 N.Y. 199, 133 N.E. 444 (1921).

³²50 Cal. 121 (1875).

³³*Budd v. Drais*, 50 Cal. 120 (1870).

³⁴50 Cal. 121, 127-28 (1875).

Therefore, one way of showing that the judgment of the trial court could have been reversed on appeal is to demonstrate that the pleadings were defective. Other proof might consist of showing that the evidence was insufficient to support the judgment of the trial court or that as a matter of law no recovery could be had on the facts alleged and proven.

IV. DEFENSES

A. Statute of Limitations

The statute of limitations will bar recovery if allowed to run by the client. But what statute of limitations is to be applied?³⁵ Four conclusions have been reached in American jurisdictions:³⁶ (1) the basis for recovery as disclosed by the complaint controls,³⁷ (2) the statute of limitations relating to actions of "malpractice" is applied,³⁸ (3) actions against an attorney for negligence are based upon breach of contract and are controlled by the statute of limitations related to contracts,³⁹ (4) statutes governing action upon a "liability" not founded upon a written instrument are applied.⁴⁰

The Mississippi Supreme Court has never squarely faced the problem of whether a malpractice action against an attorney is in tort (involving a breach of his duty to use reasonable knowledge and diligence) or whether it is in contract (due to a breach of his implied warranty that he will employ skill, knowledge and diligence). In most of the Mississippi cases the court has discussed the actions as if they were founded upon tort, but in *Johnson v. Crisler*⁴¹ the Mississippi three year statute of limitations for contracts⁴² was applied rather than the six year statute of limitations⁴³ for tort actions. Breach of contract was alleged in *Johnson v. Crisler* because the attorney attached a false certificate to an abstract of title, but apparently counsel made no contention that the six year statute should apply. It appears that the

³⁵For a good discussion of this problem see Annot., 49 A.L.R.2d 1216 (1956).

³⁶*Id.*

³⁷*Id.* at 1217; see, e.g., *Bland v. Smith*, 197 Tenn. 683, 277 S.W.2d 377 (1955).

³⁸Annot., 49 A.L.R.2d at 1218; see, e.g., *Galloway v. Hood*, 69 Ohio App. 278, 43 N.E.2d 631 (1941).

³⁹Annot., 49 A.L.R.2d at 1220; see, e.g., *Shirmer v. Nethercutt*, 157 Wash. 172, 288 P.2d 265 (1930).

⁴⁰Annot., 49 A.L.R.2d at 1222; see, e.g., *Jensen v. Sprigg*, 84 Cal. App. 519, 258 P. 683 (1927).

⁴¹156 Miss. 266, 125 So. 724 (1930).

⁴²Presently found in Miss. CODE ANN. § 729 (1956).

⁴³*Id.* § 722.

wrong choice of remedy was made⁴⁴ since the action could easily have been styled as one in the tort of deceit. The court has applied the six year statute of limitations to an action of deceit⁴⁵ where the acreage contained in a tract of land was misrepresented to the purchaser, and it would seem equally applicable to a misrepresentation of the state of title of real property as in *Johnson v. Crisler*.

Although the Mississippi Supreme Court has never expressly decided what statute of limitations applies to attorney malpractice actions, and since both the three year statute of limitations for contracts and the six year statute of limitations for torts have been applied in different cases, the logical conclusion is that a choice of remedies is available. Accordingly, if the statute of limitations might be a problem, the complaint should be styled as being in tort so as to obtain the benefit of the longer statute of limitations.

Another question concerning the running of the period of limitations is when does the statute of limitations start to run?⁴⁶ Is it from the date of the injury, or is it from the date of discovery of the injury? *Johnson v. Crisler*⁴⁷ provides the following answer:

In an action against an abstractor of titles to land for damages caused by the furnishing of a false abstract, it is immaterial, so far as the running of the statute of limitations is concerned, whether the negligence out of which the cause of action arose, was the breach of a contract, an affirmative disregard of some positive duty; in either case the cause of action accrues when the abstract of title is certified to and delivered. *The statute of limitations runs from that time and not from the time the damage occurs.*⁴⁸

Even if the attorney has concealed his negligence, it would appear that the concealment would not toll the running of the statute of limitations. In *Cook v. Rives*⁴⁹ an attorney collected money for a client and allegedly concealed the fact of collection from his client. His client

⁴⁴See Wade, *supra* note 1, at 772 (indicating that when a plaintiff has elected a remedy, the courts usually have accepted that choice).

⁴⁵Dunn v. Dent, 169 Miss. 574, 153 So. 798 (1934).

⁴⁶See Annot., 18 A.L.R.3d 978 (1968).

⁴⁷156 Miss. 266, 125 So. 724 (1930).

⁴⁸*Id.* at 269, 125 So. at 725 (emphasis added). The Mississippi rule in medical malpractice is the same; the statute of limitations runs from the time the injury occurs. See *Wilder v. St. Joseph Hosp.*, 225 Miss. 42, 82 So. 2d 651 (1955). But see *Alabama Great Southern R.R. v. Allied Chem. Corp.*, No. 71-3534 (5th Cir., Aug. 23, 1972) (construing Mississippi statute of limitations in products liability cases to run from time injury discovered).

⁴⁹21 Miss. (13 S. & M.) 328 (1850).

claimed that the concealment was fraudulent and should toll the running of the statute of limitations, but the Mississippi Supreme Court held:

If the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he cannot avail himself of the exception. A case could scarcely occur of collection of money by an attorney, in which the fact would not be discovered by reasonable diligence. The payment ought to be endorsed upon the execution and filed with the records. If that should not be done, inquiry of the sheriff, or of the defendant would lead to knowledge of the fact.⁵⁰

Therefore, alleged concealment of misconduct of an attorney will not necessarily toll the running of the statute of limitations.

In litigation involving negligence in drafting a will, the question of when the statute of limitations begins to run is often of primary importance. *Goldberg v. Bosworth*⁵¹ involved an attorney who was sued by a son who witnessed his mother's will at the lawyer's request and who was deprived of a devise thereby. The will was executed eight years before the testatrix's death, and the New York Supreme Court held that the statute of limitations started running from the date of execution and had run by the time of her death thus barring any action by the son.

A contrary view was taken in *Heger v. Flaig*⁵² where the attorney was advised by the testatrix that she planned a post-testamentary marriage, and the attorney failed to draft the will to allow for this contingency. The California Supreme Court held that the statute of limitations had not run on the beneficiaries' cause of action against the attorney and stated:

The statute of limitations does not commence to run until the testatrix' death, at which time the defendant's negligence becomes irremediable and before which time the plaintiffs possess no recognized legal interest in the testatrix' estate.

....

The negligence involved in the original drafting of the will continued after that date in defendant's failure to advise the testatrix of the possible undesired consequences if she died without having changed her will.

⁵⁰*Id.* at 330. In *Hudson v. Kimbrough*, 74 Miss. 341, 20 So. 885 (1896), the court did hold that fraudulent concealment would toll the running of the statute of limitations, but, again, the client failed to exercise due diligence. It would be an unimaginative court that would fail to find some aspect of negligence where the client failed to exercise due diligence in letting the statute of limitations run.

⁵¹29 Misc. 2d 1057, 215 N.Y.S.2d 849 (Sup. Ct. 1961).

⁵²70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

....

A second basic reason that bars the running of the statute until the testatrix' death lies in the fact that plaintiff could not bring an action against the defendant before that time. A statute of limitations does not commence to run until a cause of action accrues, and a cause of action . . . invariably accrues when a remedy is available.⁵³

No Mississippi decisions have been found in this area. Assuming that the decision in *Johnson v. Grisler* was followed, however, the statute of limitations would run from the time the will was executed and delivered to the client.

B. Lack of Privity

Lack of privity between an attorney and the person suing him has traditionally been a good defense.⁵⁴ Its major importance in America is in the area of wills where the beneficiary who has been deprived of a bequest because of alleged faulty drafting of the will has not been allowed to sue the drawer of the will, since there was no privity between the drawer and the beneficiary. However, the trend in this area is to sweep away the requirement of privity and allow suit against the attorney drawing the will. This trend is indicated by the development of the law in California as discussed below.

In *Buckley v. Gray*⁵⁵ it was felt that an attorney who improperly draws a will is not liable to third parties (beneficiaries) who are injured thereby. In *Biakanja v. Irving*⁵⁶ the Supreme Court of California held a notary who drafted a will liable to a beneficiary who lost his bequest because of negligent failure to have the will properly attested. The court there noted that it was a matter of public policy involving the balancing of various factors whether a third party not in privity should be allowed to recover on such a transaction. Finally, in *Lucas v. Hamm*,⁵⁷ *Buckley* was explicitly overruled; however, the beneficiary still did not triumph in *Lucas*. The bequest in the will violated the rule against perpetuities, and the California court noted that the rule is "a trap for the unwary" and that many eminent lawyers have barely escaped the trap. Thus, the court held that it was neither negligence, nor breach of contract to fall into the trap, and the attorney was not liable.

⁵³*Id.*, 449 P.2d at 165-67, 74 Cal. Rptr, at 229-30.

⁵⁴See section I *supra*.

⁵⁵110 Cal. 339, 42 P. 900 (1895).

⁵⁶49 Cal. 2d 647, 320 P.2d 16 (1958).

⁵⁷56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961).

C. Contributory Negligence

In most states the effect of acts constituting contributory negligence would depend upon whether the action is in tort or contract. In tort actions contributory negligence is usually a bar to the maintenance of the action; however, in an action in contract the same action would not be a bar but it would act to mitigate damages.⁵⁸ In Mississippi, however, contributory negligence would not be a bar due to our comparative negligence statute,⁵⁹ but would serve to mitigate damages in tort actions. It has been pointed out, however, that contributory negligence is rarely used as a defense.⁶⁰

D. Lack of Actionable Damages

A final defense is that, even if the attorney were negligent, the client suffered no damage. Thus in the retrial of *Erving's Hatcheries, Inc. v. Thompson*,⁶¹ the attorney defendant attempted to prove (unsuccessfully) that Erving's Hatcheries would have lost their suit against their original debtor because the debtor had a good defense of breach of warranty on the goods delivered to him by Erving's Hatcheries.

In *Grayson v. Wilkinson*⁶² an attorney allowed a default judgment to be taken against his client. In a subsequent malpractice action, the attorney successfully raised the defense that he was never informed by the client of the defense he had against the suit in which the default judgment was rendered. The Mississippi Supreme Court noted that "[i]f the defendant can prove that the defense was not a good one, then the plaintiff can . . . recover, at most, nominal damages."⁶³ Therefore, it is a good defense to show that a client's claim which was lost by an attorney's negligence was valueless anyway.

V. THE MEASURE OF DAMAGES

The measure of damages in a suit for an attorney's negligence in handling a suit has been given as:

The value of the lost claim, that is, the amount which would have been recovered in the client's action except for the at-

⁵⁸See Coggin, *supra* note 5, at 233.

⁵⁹MISS. CODE ANN. § 1454 (1956).

⁶⁰See Annot., 45 A.L.R.2d 5, at § 4 (1956).

⁶¹204 So. 2d 188 (Miss. 1967).

⁶²13 Miss. (5 S. & M.) 268 (1845).

⁶³*Id.* at 288.

torney's negligence, is at least a proper element of damages, and it is frequently spoken of as "the" measure of damages.⁶⁴

Similarly, where a faulty certification of title has been given, the measure of damages has followed

[t]he established rule that the tort or contract liability of a party is limited to the difference in value between what the plaintiff's property is worth and what it would be worth but for the fault of the defendant. We have found no precedent for requiring the defendant in effect to purchase the property from the plaintiff, as the judgment below directs.⁶⁵

The above statements make it clear that the measure of damages in a malpractice suit for an attorney's negligence is about the same as in any other tort or contract action and that there are no special rules applicable to this particular area of law.

VI. ACTS CONSTITUTING NEGLIGENCE

The following acts have been held to constitute actionable negligence by an attorney in Mississippi: failing to file a suit promptly as directed by the client,⁶⁶ entering an appearance without authority,⁶⁷ failing to defend a client's action,⁶⁸ allowing the statute of limitations to bar a client's action,⁶⁹ dismissing a suit without authority,⁷⁰ negligent acts of those taking over affairs entrusted to a retired attorney,⁷¹ compromising a client's claim without authority,⁷² returning money collected from a debtor to the debtor because of a disagreement with the client over the attorney's demand for a larger fee than was originally agreed,⁷³ and losing a client's funds by turning them over to a third person for delivery contrary to the client's instructions.⁷⁴

In other jurisdictions the following have been found to constitute actionable negligence by an attorney: preparation of improper findings which were adopted by the court as its judgment,⁷⁵ failure to inform a client that a judge's ruling is contrary to general law and would prob-

⁶⁴Annot., 45 A.L.R.2d 63 (1956).

⁶⁵Gleason v. Title Guar. Co., 300 F.2d 813, 815 (5th Cir. 1962).

⁶⁶Fitch v. Scott, 4 Miss. (3 How.) 314 (1839).

⁶⁷Schirling v. Scites, 41 Miss. 644 (1868).

⁶⁸Grayson v. Wilkinson, 13 Miss. (5 S. & M.) 268 (1845).

⁶⁹Thompson v. Erving's Hatcheries, Inc., 186 So. 2d 756 (Miss. 1966).

⁷⁰Coopwood v. Baldwin, 25 Miss. 129 (1852).

⁷¹Wilkinson v. Griswold, 20 Miss. (12 S. & M.) 669 (1849).

⁷²Lombard v. Whiting & Lewis, 1 Miss. (Walker) 229 (1826).

⁷³Nathan & Co. v. Halsell, 91 Miss. 785, 45 So. 856 (1908).

⁷⁴Grayson v. Wilkinson, 13 Miss. (5 S. & M.) 268 (1845).

⁷⁵Armstrong v. Adams, 102 Cal. App. 677, 283 P. 871 (1929).

ably be reversed on appeal,⁷⁶ failure to file timely notice of appeal,⁷⁷ failure to properly draft a mortgage instrument which was governed by the law of a foreign jurisdiction,⁷⁸ failure to have a will properly attested⁷⁹ (this was done by a non-attorney — a notary), paying money of an infant into court rather than to the infant's guardian,⁸⁰ abandonment of conduct of litigation without justifiable cause,⁸¹ failure to make proper examination of title,⁸² failure to record a deed in the proper county,⁸³ and failure to inform a client that an instrument needed to be recorded.⁸⁴

It should be noted that since decisions made during the trial of a case have to be "made in the heat of battle" and involve "tactical considerations that are not susceptible of precise evaluation," most courts will not second guess an attorney's decisions made in the course of a trial.⁸⁵ In *Lynn v. Lynn*⁸⁶ the Washington Supreme Court expressed this attitude of courts as follows:

Attorneys frequently differ on trial tactics. . . . A difference in opinion on trial tactics, however, does not constitute either negligence or incompetence. The test of skill and competence of counsel is: After consideration of the entire record, was the complaining party afforded a fair trial?⁸⁷

The California court in *Nahhas v. Pacific Greyhound Lines*⁸⁸ was more emphatic as to an attorney's right to control the trial of a case, stating:

It is common experience that attorneys and their clients frequently differ and even violently disagree between or among themselves with reference to the conduct or procedure which should relate to the trial of the action. However, it is well established law that the attorney has complete charge and supervision of the procedure that is to be adopted and pursued in the trial of an action.⁸⁹

⁷⁶*Young v. Bridwell*, 20 Utah 2d 332, 437 P.2d 686 (1968).

⁷⁷*Pete v. Henderson*, 124 Cal. App. 2d 487, 269 P.2d 78 (1954).

⁷⁸*Degen v. Steinbrink*, 202 App. Div. 477, 195 N.Y.S. 810 (1922).

⁷⁹*Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958).

⁸⁰*In re Woods*, 158 Tenn. 383, 13 S.W.2d 800 (1929).

⁸¹*Howard v. McCarson*, 215 Ala. 251, 110 So. 296 (1926).

⁸²*Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962).

⁸³*Hampel-Lawson Mercantile Co. v. Poe*, 169 Ark. 840, 277 S.W. 29 (1925).

⁸⁴*Feil v. Wishek*, 193 N.W.2d 218 (N.D. 1971).

⁸⁵Note, *Attorney Malpractice*, *supra* note 5, at 1301.

⁸⁶4 Wash. App. 171, 480 P.2d 789 (1971).

⁸⁷*Id.*, 480 P.2d at 792.

⁸⁸192 Cal. App. 2d 145, 13 Cal. Rptr. 299 (1961).

⁸⁹*Id.*, 13 Cal. Rptr. at 300.

These statements show that much more than a mere difference of opinion is necessary before negligence will be found in the trial of an action.

VII. REPRESENTING CONFLICTING INTERESTS

As a final note, consider the danger inherent in representing multiple parties. In some circumstances conflicting interests may be present, and unless the attorney makes a full disclosure of this to both parties and fairly represents the interests of both parties, he may be guilty of negligence.⁹⁰ One situation in which this is likely to happen is where the same attorney represents both the insurer and the insured, either in settlement negotiations or the trial of a personal injury action. The interest of the insurer is usually to settle below the limits of coverage of the insurance policy while the insured may be willing to settle for a higher figure in order to avoid the possibility of judgment well in excess of the policy limits.

A case which illustrates the dangers involved in such a situation is *Lysick v. Walcom*,⁹¹ where Rardin was insured by Allstate Insurance Company under a policy limited to \$5,000 for bodily injury to any one person and \$10,000 for all bodily injury arising out of a single accident. An automobile driven by Rardin collided with an automobile driven by Vitaly Lysick and in which Alexander Lysick was a passenger; all three persons were killed in the accident. A wrongful death action was brought by the family of the two Lysicks, and Allstate hired an attorney (Walcom) to handle the action on behalf of Allstate and Rardin's estate. The plaintiffs offered to settle their claims, totalling \$450,000, against the estate of Rardin for \$12,500. Rardin's executor offered to pay \$2,500 if Allstate would pay \$10,000, but Allstate was at this point only willing to pay \$9,500. Finally, Allstate authorized Walcom to settle for the policy limit of \$10,000, but Walcom did not communicate this fact to Rardin's administrator until six days before trial of the action. This was over one year after Allstate authorized Walcom to contribute \$10,000 towards settlement. By this time, however, Rardin's administrator had died and the \$2,500 he had offered was no longer available since it had been his personal funds. Consequently, the action went to trial and resulted in a judgment of \$225,000 against Rardin's estate in favor of the plaintiffs. The plaintiffs obtained an assignment from Rardin's estate of any cause of action that it might have against Allstate and Walcom and then instituted the present action

⁹⁰See Annot., 28 A.L.R.3d 389 (1969).

⁹¹368 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

alleging bad faith in Allstate's refusal to settle the claims against Hardin's estate and negligence on the part of Walcom in representing the estate. Prior to trial the plaintiffs compromised their claims against Allstate for \$89,000. A verdict of the trial court in favor of Walcom was reversed, and the California Court of Appeals found that as a matter of law the attorney had been negligent in his representation of the estate stating:

The uncontradicted facts in the present case can lead a reasonable man to conclude only that the defendant acted solely upon practical considerations in the interests of Allstate and considered his duties to the insurance company paramount to his duties to the estate. By continuing to act as counsel for the estate, while entertaining the belief that his primary obligation in the matter of settlement was to the insurer, defendant violated the legal and ethical concepts which delineated his duties to the estate.

. . . .

In the light of defendant's duty to the insured, we hold as a matter of law defendant's conduct under the circumstances of the particular case violated the general standards of professional care which required him to use such skill, prudence and diligence in the settlement of the claim against the estate as lawyers of ordinary skill and capacity would have commonly used in the performance of like task.⁹²

The court remanded the case for trial on the factual question of whether the attorney's negligence was the proximate cause of the failure to obtain a fair settlement or whether Allstate would have caused such a result even if the attorney had not been negligent.

As the above example indicates, in representing both an insurer and insured, situations may arise in which there is a conflict of interest between the clients, and by acting as attorney for both, an attorney may be liable for negligence unless he makes a full disclosure of the situation and adequately represents the insured. Similar liability may be incurred by representing both parties in a divorce action⁹³ or by representing both a debtor and creditor.⁹⁴ Thus, an attorney should exercise caution in attempting to serve two masters.

Gordon Baird

⁹²*Id.*, 65 Cal. Rptr. at 416-17.

⁹³*Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

⁹⁴*Lowall v. Groman*, 180 Pa. 532, 37 A. 98 (1897).

LAY OPINION TESTIMONY IN MISSISSIPPI

I. INTRODUCTION

Few rules of evidence have served as effectively to baffle witnesses and confuse juries as the opinion rule. The doctrine is deceptively simple to state: "The normal function of a witness is to state facts, and not opinions. . . . The general rule is that the opinion evidence is not admissible."¹ In application, however, the rule is riddled with exceptions, confusion, and misunderstanding. The result is hopeless disharmony in decisions concerning the admissibility of opinion evidence.²

Originally the opinion rule was aimed at insuring the testimonial competence of witnesses. It is an ancient principle that a witness is required to testify from his personal observation and knowledge,³ and the opinion rule prohibited testimony of surmise or conjecture. Since its inception, however, the rule has undergone a transformation; now some authors have stated that "any opinion of a witness invades the province of the jury."⁴

To fully understand the opinion doctrine it is necessary to examine the history of the rule and its evolution. Further, any study of the rule today must consist primarily of a study of its numerous exceptions. It is the purpose of this paper to review the theory and development of the opinion rule and to attempt to clarify the rules of admissibility of lay opinion testimony in Mississippi.

II. HISTORY OF THE OPINION RULE

In the early days of the jury trial, jurors were selected who had knowledge of the parties and facts of the lawsuit. Upon this personal knowledge the jurors based their verdict.⁵ As sworn witnesses emerged upon the scene, however, the requirement of personal observation arose.⁶ Emphasizing the impropriety of one who speaks solely from hearsay, it was held that a witness could testify only to that which he had seen and heard.⁷ Wigmore suggests that it was this principle of personal observa-

¹T. McELROY, MISSISSIPPI EVIDENCE § 34, at 154 (1955) [hereinafter cited as McELROY].

²BUSH, TRIAL PROCEDURE MATERIALS, in D. LOISELL, CASES AND MATERIALS ON EVIDENCE 547 (1968) [hereinafter cited as LOISELL].

³J. THAYER, EVIDENCE AT THE COMMON LAW 524 (1898).

⁴McELROY, *supra* note 1, § 34, at 154.

⁵BUSH, TRIAL PROCEDURE MATERIALS, in LOISELL, *supra* note 2, at 546.

⁶7 J. WIGMORE, EVIDENCE § 1917, at 2 (3d ed. 1940) [hereinafter cited as WIGMORE].

⁷BUSH, TRIAL PROCEDURE MATERIALS, in LOISELL, *supra* note 2, at 546.

tion to which Lord Coke referred in his classic dictum of 1622: "It is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself.'" ⁸ Lord Mansfield addressed himself to the same problem in 1766 when he stated in *Carter v. Boehm*,⁹ "It is mere opinion, which is not evidence."¹⁰

The rule excluding opinions had a meaning for Lord Mansfield and his colleagues of 1766 different from that which it bears today. This difference is in part a result of the evolution of word meanings. In eighteenth century England the word "opinion" carried an implication of "lack of grounds" similar to our word "notion." In the United States today "opinion" has come to denote an inference or conclusion without the implication that it necessarily lacks support or is ill-founded.¹¹ Wigmore states that when the English and early American judges disparaged "mere opinion" they never had in mind the case of the lay witness who had fact-knowledge and included in his testimony an opinion based on that knowledge. They referred, instead, to the case in which the witness had no knowledge of the facts and thus was actually in no better position than the jury to state an opinion.¹² It was not until the nineteenth century that the rule excluding inferences by witnesses possessing personal knowledge developed.¹³

The precise reason for the evolution of the meaning of the opinion rule is unclear. Some writers attribute the change to "careless usage," which caused the concept to be passed along that "opinion is not evidence."¹⁴ Wigmore calls the change the logical "technical development of a misunderstood term."¹⁵ Others suggest that the confusion surrounding the rule is caused by the inherent ambiguity of the word "opinion."¹⁶ According to Learned Hand the change probably came about as a result of the "gradual recognition by successive judges of the advantage of curtailing the trial and simplifying the issue by leaving out redundant matter."¹⁷

⁸*Adams v. Canon*, Dyer 53b (1622), in 7 WIGMORE, *supra* note 6, § 1917, at 2.

⁹97 Eng. Rep. 1162 (1766).

¹⁰*Id.* at 1168.

¹¹C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 21 (1954) [hereinafter cited as McCORMICK]. "In the old sense, 'opinion'—more correctly, 'mere opinion'—is a guess, a belief without good grounds; in the modern sense, 'opinion' is an inference from observed and communicable data." 7 WIGMORE, *supra* note 6, § 1917, at 10.

¹²7 WIGMORE, *supra* note 6, § 1917, at 8.

¹³McCORMICK, *supra* note 11, at 21.

¹⁴7 WIGMORE, *supra* note 6, § 1917, at 8.

¹⁵*Id.* § 1929, at 26.

¹⁶McCORMICK, *supra* note 11, at 22.

¹⁷Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 44 (1901).

Whatever the reason for its evolution, the opinion rule today is generally misunderstood and is the cause of widespread confusion. In decisions as to the admissibility of opinion evidence, one finds "diametrically opposed rulings on identical states of fact."¹⁸ While in some courts opinion evidence is being admitted in cases where it was previously excluded, the majority of courts still apply the opinion rule "illiberally and inconsistently."¹⁹ In Mississippi, as in most jurisdictions, there is a great need for clarification and liberalization of this perplexing rule of evidence.

III. THEORY OF THE OPINION RULE

The reason generally stated for a rule barring opinion testimony is that such testimony "usurps the function" or "invades the province" of the jury.²⁰ According to Wigmore this theory is erroneous and should be repudiated entirely.²¹ Espousing a doctrine that has since been adopted by other legal writers,²² Wigmore said that the phrase "usurps the function of the jury" implies a moral impropriety or a tactical unfairness in allowing the witness to state his opinion.²³ This implication, he says, is entirely unfounded. A witness, when he states an opinion, is not trying to usurp the function of the jury, nor could he do so even if he wished. The jury is not bound to accept the opinion of a witness and may reject it unless satisfied that the witness is credible and his opinion reasonable. The theory that opinion testimony "invades the province" of the jury is merely an attempt to justify the rule.

The true theory of the opinion rule is the exclusion of superfluous evidence.²⁴ Whenever the conclusion or inference may be drawn by the jury as well as by the witness, the testimony of the witness's opinion is superfluous. It is of no value to the jury.²⁵ Thus viewed, the opinion rule is a rule of expediency and convenience.

Other legal writers emphasize the concept of utility to the trier of fact in the application of the opinion rule.²⁶ Opinion testimony, according to these authorities, should be excluded only when its value is out-

¹⁸BUSH, TRIAL PROCEDURE MATERIALS, in LOUISELL, *supra* note 2, at 547.

¹⁹Comment, *Expert and Opinion Evidence*, 14 MO. L. REV. 294, 295 (1949).

²⁰McELROY, *supra* note 1, § 34, at 154.

²¹7 WIGMORE, *supra* note 6, § 1920, at 17.

²²McCORMICK, *supra* note 11, at 26; Fisch, *Lay Opinions in New York*, 37 CORNELL L. REV. 32 (1951); Note, *Opinion Evidence on the Issues Before the Jury*, 16 N.C.L. REV. 180 (1938).

²³7 WIGMORE, *supra* note 6, § 1920, at 17.

²⁴*Id.* § 1918, at 10.

²⁵*Id.*

²⁶McCORMICK, *supra* note 11, at 23.

weighed by the substantial danger of misleading or confusing the jury.²⁷ The utility principle was recognized in the Proposed Federal Rules of Evidence.²⁸ Rule 701 states that opinion testimony by a lay witness should be admissible only when the opinion is (a) rationally based on the perception of the witness, and (b) *helpful to a clear understanding of his testimony or the determination of a fact in issue*.²⁹

The concepts of utility to the jury and the exclusion of superfluous evidence were clearly combined when the Supreme Court of Alaska found that "[t]he purpose of opinion testimony is to aid the jury in arriving at the truth, and if the testimony does not furnish such aid it should be dispensed with because it is not needed."³⁰

The opinion rule has long been the subject of frequent and severe attacks by legal authorities.³¹ The most frequently cited objection is that witnesses, when told to state facts and not opinions, become baffled and confused. Their testimony as a result is often misleading and inaccurate.³² McCormick calls the rule "the clumsiest of all the tools furnished the judge for regulating the examination of witnesses."³³ The rule is clumsy because its basic premise is wrong. Based on the assumption that "facts" and "opinions" stand in contrast and are readily distinguishable, the opinion rule is founded upon error.³⁴ Every statement is subjective, and no matter how specific, detailed, and factual it may be, it is in some measure "the product of inference and reflection as well as observation and memory."³⁵ To illustrate this point McCormick uses two sentences: "He was driving on the left-hand side of the road" and "He was driving carelessly."³⁶ The difference between the former statement, a so-called "fact," and the later "opinion" is not a difference between contrasting absolutes. Instead, it is "merely a difference between a more concrete and specific form of descriptive statement and a less specific and concrete form . . . a mere difference in degree with no recog-

²⁷*Id.* at 26.

²⁸PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES (1971 Rev. Draft).

²⁹*Id.*, rule 701, at 88 (emphasis added).

³⁰*Meyst v. East Fifth Ave. Serv.*, 401 P.2d 430, 438 (Alas. 1965).

³¹McCORMICK, *supra* note 11, at 22; 7 WIGMORE, *supra* note 6, § 1929, at 27; Fisch, *supra* note 22, at 34; McCormick, *Opinion Evidence in Iowa*, 19 DRAKE L. REV. 245 (1970); Comment, *Opinion Evidence in Connecticut*, 24 CONN. BAR J. 436 (1950).

³²*United States v. Cotter*, 60 F.2d 689 (2d Cir. 1930), *cert. denied*, 287 U.S. 666 (1932).

³³McCORMICK, *supra* note 11, at 22.

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*

nizable line to mark the boundary."³⁷ The rule barring opinions may best be understood as a rule of preference which favors the concrete over the abstract.

An opinion may not be admitted when it concerns the ultimate fact in issue.³⁸ This statement is probably an extension of the general rule that a witness should not be allowed to give an opinion as to how the case should be decided.³⁹ The reason advanced for the ultimate issue rule, like that for the opinion rule itself, is that the testimony invades the province of the jury.⁴⁰ Testimony of an opinion on the ultimate issue, however, invades the province of the jury no more than does testimony of an eye-witness to a decisive fact. In either case the evidence is conclusive only if the jury is satisfied of the witness's trustworthiness.

The purpose of the opinion testimony, however, may well have an effect on the degree of concreteness required. The nearer the questions approach the hub of the issue, the more careful the court may become to require details instead of inferences. "Evidence on the very point in issue would seem to be of the highest pertinency,"⁴¹ and a strict application of the rule barring opinions on the ultimate issue would lead to "the absurd result that admissibility varies in inverse proportion to relevancy."⁴² This fact is recognized in the Proposed Federal Rules of Evidence and California's Annotated Evidence Code where the ultimate issue rule is abolished.⁴³

IV. EXCEPTIONS TO THE RULE

Any discussion of the opinion rule must necessarily include a study of its numerous exceptions. As the rule evolved, a distinct line was eventually drawn: witnesses testified to the facts, and from these facts the jury made inferences and deductions. No sooner was this rule firmly established than its first exception arose. Some evidence was of such a complex and technical nature that the jury was not capable of understanding it. A jury of laymen was unable to draw the correct inferences and conclusions from the facts presented.⁴⁴ Thus, for reasons of necessity,

³⁷*Id.*

³⁸*Id.* at 25.

³⁹*Id.*

⁴⁰*Id.* at 26.

⁴¹Note, *Opinion Evidence on the Issues Before the Jury*, *supra* note 22, at 183.

⁴²*Id.*

⁴³CAL. EVID. CODE § 805 (West 1967); PROP. FED. R. EVID., *supra* note 28, rule 704, at 91 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

⁴⁴McCormick, *Opinion Evidence in Iowa*, *supra* note 31, at 246.

the *expert* was allowed to state his opinion when properly qualified. Expert testimony remains one of the most frequently employed exceptions to the opinion rule.⁴⁵

While the guidelines governing the admissibility of expert testimony have become relatively well-defined, the same is not true of lay opinion testimony. The historical development of the rule has led to confusion and disharmony. In early America the excessively strict application of the lay opinion rule was found to obstruct and delay justice,⁴⁶ and various courts attempted to alleviate the situation by creating specific exceptions to admit lay opinion testimony. Lay witnesses were eventually allowed to give their opinions concerning matters of mental condition,⁴⁷ physical condition and health,⁴⁸ age,⁴⁹ identity,⁵⁰ and handwriting,⁵¹ as well as in matters of value,⁵² speed,⁵³ and various other issues.⁵⁴ Today the exceptions to the rule are so numerous that "the original rule against opinions has evolved into a rule conditionally approving them."⁵⁵

Although the lay exceptions arose haphazardly rather than pursuant to any general theory, they fall into several broad categories. Lay witnesses are often permitted to testify to what are technically opinions or conclusions when their knowledge of the matter is derived from the application of one or more of the five senses — sight, hearing, taste, smell and touch.⁵⁶ Thus, a lay witness may be permitted to testify concerning one's age, physical appearance, apparent racial origin, or resemblance. Lay opinion testimony has also been held admissible in "non-expert state of mind evidence."⁵⁷ Testimony of the lay witness may be admitted to

⁴⁵The subject of expert opinion testimony is beyond the scope of this article. It has been the subject of numerous writings in legal periodicals during the last few years. See, e.g., Adam, *Expert Medical Testimony in Mississippi*, 40 Miss. L.J. 241 (1969); Note, *Admissibility of Expert Opinion Testimony in Motor Vehicle Accident Cases*, 39 Miss. L.J. 317 (1968).

⁴⁶While the original opinion rule arose under the English common law, the exclusion of lay opinion testimony, according to Wigmore, is a peculiarly American doctrine. English courts today avoid problems of opinion testimony with a liberal policy concerning its admission. 7 WIGMORE, *supra* note 6, § 1917, at 8.

⁴⁷Gathings v. Howard, 122 Miss. 355, 84 So. 240 (1920).

⁴⁸Columbian Mut. Life Ins. Co. v. Gunn, 173 Miss. 897, 163 So. 454 (1935).

⁴⁹Messina v. New York Life Ins. Co., 173 Miss. 387, 161 So. 462 (1935).

⁵⁰Mathison v. State, 87 Miss. 739, 40 So. 801 (1906).

⁵¹Western Union Tel. Co. v. Goodman, 166 Miss. 782, 146 So. 128 (1933).

⁵²Town of Union v. J.R. Buchwalter Lumber Co., 136 Miss. 414, 101 So. 561 (1924).

⁵³Perez v. Fayard, 64 F.2d 667 (5th Cir. 1933).

⁵⁴McELROY, *supra* note 1, § 35, at 160.

⁵⁵McCormick, *Opinion Evidence in Iowa*, *supra* note 31, at 245.

⁵⁶BUSH, TRIAL PROCEDURE MATERIALS, in LOUISELL, *supra* note 31, at 250.

⁵⁷McCormick, *Opinion Evidence in Iowa*, *supra* note 31, at 250.

show the sanity or insanity of a testator even though such testimony will necessarily include opinions.

A third area in which opinion testimony by a lay witness has been admitted involves those cases in which the courts have accepted limited practical experience in ordinary situations as expert qualification.⁵⁸ Thus, in cases involving the value of property, the speed of vehicles, or the meaning of business jargon, one who is actually a layman may be permitted to express his opinion.

The most frequently cited exception to the rule barring lay opinion testimony, like the exception for expert testimony, stems from necessity. There are often conditions or events which are not susceptible to reproduction by a detailed description. The witness may find it impossible to separate the facts from his conclusions and to detail all the pertinent facts in such a way as to enable the jury to form a conclusion. In such a case the witness may be permitted to state his inferences or opinions.⁵⁹ By employing this necessary sort of "verbal shorthand" or "shorthand rendering of fact,"⁶⁰ he utilizes the only available means of conveying his observations to the jury.

V. THE OPINION RULE IN MISSISSIPPI

The opinion rule is well entrenched in Mississippi law. In the 1831 case of *Torrance v. Hurst*,⁶¹ the Mississippi Supreme Court stated that "impressions, and opinions, and inducements and faint recollections are not legal evidence."⁶² By 1859 the court had made clear the rule that witnesses "must state facts and circumstances, and leave the jury to draw conclusions and inferences from those facts."⁶³

As stated before, McElroy offers as the primary reason for the rule the theory that any opinion by a witness invades the province of the jury.⁶⁴ A thorough perusal of the Mississippi cases on the subject however, reveals that the court has at times looked deeper into the issue than McElroy suggests. While the decisions on the subject may not be uniform, the Mississippi Supreme Court seems to have an understanding of the basic problem of opinion testimony which, though hazy and uncrystalized, reaches nearer the very core of the issue than one may first believe. "Necessity, in a general sense, lies at the foundation of the

⁵⁸BUSH, TRIAL PROCEDURE MATERIALS, in LOUISELL, *supra* note 2, at 547.

⁵⁹McELROY, *supra* note 1, § 35, at 160.

⁶⁰McCormick, *Opinion Evidence in Iowa*, *supra* note 31, at 248.

⁶¹1 Miss. (Walker) 403 (1831).

⁶²*Id.* at 404-05.

⁶³Dunlap v. Hearn, 37 Miss. 471, 475 (1859).

⁶⁴McELROY, *supra* note 1, § 34, at 154.

opinion rule," the court has stated, "and when the necessity for opinions no longer exists, opinions are ordinarily no longer admissible."⁶⁵

In *Illinois Central Railroad Co. v. Williams*,⁶⁶ a 1961 death case involving a collision between the defendant's moving freight train and the automobile of the decedent, the court, without expressly stating that it was so doing, applied Wigmore's theory of the exclusion of superfluous evidence and McCormick's utility to the trier of fact principle. It was held by the court that testimony of a city police captain as to his opinion of the unusually dangerous condition at a crossing should have been excluded:

Where the facts can be produced and presented to the jury or other trier of facts by direct evidence, in such a manner that they can have an adequate basis for formulation of their own decision, without extraneous assistance, opinion evidence (such as that here) should not be admitted. . . . If the facts cannot be presented or communicated, opinion evidence may be received.⁶⁷

The true criterion of the admissibility of opinion evidence, stated the court, is whether the jury will receive appreciable help from the witness.⁶⁸

The rule that a witness may testify as to facts which he observed, but not to his opinion of what happened, is regularly employed to exclude the testimony of police officers as to the point of impact in automobile collision cases.⁶⁹ The officer who arrives on the scene after the

⁶⁵*Messina v. New York Life Ins. Co.*, 173 Miss. 378, 390, 161 So. 462, 464 (1935).

⁶⁶242 Miss. 586, 135 So. 2d 831 (1961).

⁶⁷*Id.* at 606-07, 135 So. 2d at 839.

⁶⁸*Id.* The Mississippi Supreme Court has followed this same theory of utility in regard to expert opinion testimony. In the *Williams* case the court stated that testimony by an expert should be admissible when "the jurors themselves are not capable, from want of experience or knowledge of the subject, of drawing correct conclusions from the facts." *Id.* at 607, 135 So. 2d at 840. Where, on the other hand, the opinion is on a common matter such as whether or not a hole in the sidewalk is dangerous, the testimony will be excluded since "the ordinary witness can add no special knowledge to that possessed by the jury." *Ming v. City of Jackson*, 202 Miss. 260, 267, 31 So. 2d 900, 901 (1947). The jury in such a case is as capable of forming the correct opinion from the facts as is the witness. *Louisville, N.O. & T.R.R. v. Natchez, J. & C.R.R.*, 67 Miss. 399, 7 So. 350 (1890).

In *Hagan Storm Fence Co. v. Edwards*, 245 Miss. 487, 148 So. 2d 693 (1963), the court excluded the testimony of an "expert accidentologist" as to his opinion concerning the responsibility for an automobile collision. The court said that there is nothing complicated about intersectional collision of two vehicles. The facts could be presented in such a manner as to enable the jury to form their own opinion and the expert's testimony was unnecessary.

⁶⁹*See, e.g., Jones v. Welford*, 215 So. 2d 240 (Miss. 1968); *Schumpert v. Watson*, 241 Miss. 199, 129 So. 2d 627 (1961).

collision has taken place may testify as to the location upon his arrival of vehicles, persons, skid marks, and debris, and he may mark these things on a map or diagram. It is improper, however, for him to give his opinion as to the point of impact or who was at fault.⁷⁰ The exclusion of his opinions on these matters does not deprive the jury of any helpful aid to its own powers of deduction. The testimony is simply unnecessary.

Necessity is also the basis for the most frequently cited exception to the lay opinion rule in Mississippi. Where it is impractical or impossible for the witness to detail all the facts in such a way as to enable the jury to form an opinion, lay opinion testimony is admissible for "it is the only method of conveying to the jury the effect on his mind of what was observed by him."⁷¹

The Mississippi Supreme Court has recognized and applied this "collective statement of fact" principle to age in *Messina v. New York Life Insurance Co.*,⁷² and physical pain and injuries in *Dennis v. Prisock*.⁷³ In any case, the necessity for the witness's opinion must always be shown before the opinion is admissible.

In addition to the necessity requirement, in Mississippi there is the additional requirement that the witness have *knowledge* of the facts upon which he bases his opinion.⁷⁴ In the case of an expert, hypothetical questions may be substituted for first-hand knowledge, but the

⁷⁰*Lynch v. Suthoff*, 220 So. 2d 593, 597 (Miss. 1969). In *Standard Oil Co. v. Crane*, 199 Miss. 69, 23 So. 2d 297 (1945), testimony of the officer as to the point of impact was held properly excluded. The court stated that it did not decide whether the witness, who was a member of the State Highway Patrol, was an expert in interpreting signs of collisions. Whether he was an expert or not, the exclusion of his opinion "deprived the jury of no helpful aid to its own powers of deduction." *Id.* at 80, 23 So. 2d at 299.

⁷¹*McELROY*, *supra* note 1, § 35, at 160.

⁷²173 Miss. 378, 161 So. 462 (1935). The Mississippi rule regarding opinions as to age was set forth in *Messina*:

When a rough approximation of the age of a person is sufficient for the purpose of a particular inquiry, so that, for instance, a variation of five to ten years from the true age would not be material, it is the general practice in the interest of time and economy of effort to allow witnesses to answer to the age as a matter of opinion; and even when the very nearly exact age is the subject under investigation, opinion evidence is admissible, under the rule of necessity, when no better and no higher class of evidence is practicably obtainable in the particular case. [*Id.* at 389, 161 So. at 464].

⁷³221 So. 2d 706 (Miss. 1969).

⁷⁴*Illinois Cent. R.R. v. Williams*, 242 Miss. 586, 135 So. 2d 831 (1961). "Ordinarily a witness must confine his testimony to matters within his own knowledge." *Id.* at 607, 135 So. 2d at 840.

same is not true of the non-expert witness. The lay witness must base his opinion upon facts of which he has personal knowledge and he must state, so far as he can, a detailed enumeration of these facts before giving his opinion.⁷⁵ Once he has stated as many facts as is practical, he may testify as to his opinion concerning mental condition and capacity,⁷⁶ speed of a car,⁷⁷ identity,⁷⁸ handwriting,⁷⁹ value,⁸⁰ or numerous other matters.⁸¹

The factual knowledge requirement has been stressed in cases involving the issues of sanity and land values. The rule is well settled in this state that a lay witness may state his opinion as to the sanity or insanity of a person, but the witness must have had an opportunity to observe the person and must have some first-hand knowledge on which to formulate his opinion.⁸² The lay opinion cannot be based on an abstract hypothetical question,⁸³ nor can the non-expert witness be allowed to project his opinion as to the mental condition at a future time.⁸⁴ His opinion must be based upon his own knowledge of the facts and must be limited to the impressions made at the time of his observation.⁸⁵

In the 1967 case of *Mississippi Power Co. v. Walters*,⁸⁶ the Mississippi Supreme Court stated its first-hand knowledge requirement concerning opinion testimony on the issue of land values:

[W]e have heretofore held that a man does not have to be an expert in land values in order to testify with reference to damages as occasioned by the condemnation of land with which he is familiar. However. . . it is. . . incumbent upon that person. . . that he is familiar with the land involved and acquainted with the uses to which the land has been put and the monetary benefits derived therefrom.⁸⁷

⁷⁵Ward v. Ward, 124 Miss. 697, 87 So. 153 (1921); Torrance v. Hurst, 1 Miss. (Walker) 403 (1831).

⁷⁶Gathings v. Howard, 122 Miss. 355, 84 So. 240 (1920).

⁷⁷Perez v. Fayard, 64 F.2d 667 (5th Cir. 1933).

⁷⁸Mathison v. State, 87 Miss. 739, 40 So. 801 (1906).

⁷⁹Southern Express Co. v. Thornton, 41 Miss. 216 (1866).

⁸⁰Town of Union v. J.R. Buckwalter Lumber Co., 136 Miss. 414, 101 So. 561 (1924).

⁸¹McELROY, *supra* note 1, § 35, at 160.

⁸²Hickey v. Anderson, 210 Miss. 455, 49 So. 2d 713 (1951); Wood v. State, 58 Miss. 741 (1881).

⁸³*In re Prine*, 208 So. 2d 187, 190 (Miss. 1968).

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶204 So. 2d 471 (Miss. 1967).

⁸⁷*Id.* at 476.

In earlier years the court admitted opinion testimony as to land value by calling the witness with first hand knowledge an "expert witness." As pointed out in *Pearl River Valley Water Supply District v. Wood*,⁸⁸ however, "this is a misnomer, for no peculiar ability or specialized training is required to testify as to the market value of property."⁸⁹ The requirement is simply that the lay witness have *personal knowledge* of the land and its use.⁹⁰

The third requirement for the admission of opinion evidence in Mississippi is that the witness be competent to correctly form the opinion he offers. In the case of the expert witness this competence is determined by his qualifications as an expert. As a result of his knowledge and experience in a certain area he is considered competent to answer hypothetical questions concerning the suit or to form opinions based on his first-hand knowledge. The lay witness, too, must be competent to form the opinion he offers. Matters about which lay witnesses are competent to form opinions, however, include only those "about which all men have more or less knowledge according to their mental capacity and habits of observation. They are matters about which they may and do form opinions sufficiently satisfactory to constitute the basis of action."⁹¹ Lay opinion testimony is thus admissible in cases involving issues of insanity or intoxication because these are matters about which normal people correctly draw conclusions and form opinions.

One aspect of the opinion doctrine which has frequently been the topic of discussion by the Mississippi Supreme Court is the ultimate issue rule. The court has often spoken of an invasion of the "exclusive province of the jury" with regard to the ultimate issue in the case.⁹² "The verdict should express the jury's own independent conclusion from the facts and circumstances in evidence, and not be the echo of the opinions of witnesses, perhaps not unbiased."⁹³ But the court has gone further to say that a substitution of the conclusion of a witness for that of the jury may be avoided by requiring the "best rea-

⁸⁸252 Miss. 580, 172 So. 2d 196 (1965).

⁸⁹*Id.* at 598, 172 So. 2d at 204.

⁹⁰*Id.* The knowledge requirement is also pointed out in cases involving the value of objects other than land. In *National Bank v. Gorenflo*, 173 Miss. 646, 655, 160 So. 911, 914 (1935), the court stated: "A witness may give his opinion as to values [of stock] after stating the basis therefor where he has sufficient facts upon which to base his opinion."

⁹¹*Hutson v. Continental Cas. Co.*, 142 Miss. 388, 395, 107 So. 520, 522 (1926).

⁹²*See, e.g., Harris v. Pounds*, 185 Miss. 688, 187 So. 891 (1939).

⁹³*Id.* at 697-98, 187 So. at 894.

sonably attainable evidence of those facts" upon which the jury is to base its conclusion.⁹⁴

In Mississippi, as in every state, the rules governing the admissibility of lay opinion testimony are confused and irrational. There has never been the single case in which these rules are clearly defined. Instead, the court has grasped at different facets of the opinion problem when faced with different situations. An overview of the cases reveals a general understanding of the theory of the doctrine, but the rules have never been effectively expressed. According to McCormick, "good sense demands that the trial judge be accorded a wide range of discretion" in the admission of opinion evidence,⁹⁵ and McElroy says that in Mississippi the judge has this discretion.⁹⁶ What is lacking, though, is a concise statement of guidelines to aid him in the exercise of his discretion.

It is submitted that the cases in Mississippi sustain a three-part test for the admissibility of lay opinion testimony. First, the opinion must be *necessary* as an aid to the jury. This requirement is the basis of the old exceptions to the opinion rule for "shorthand renderings of fact" and impressions which are incapable of being set forth as facts alone. Second, the witness must have *first-hand knowledge* of the facts upon which he basis his opinion. The lay opinion may not be based on hearsay. Third, the opinion must be the type that a lay witness is *competent* to form, *i.e.*, it must be that kind of opinion which normal people constantly and correctly make.

VI. CONCLUSION

As is every rule of law, the opinion rule is the product of an evolutionary process. The rule has lost some of its potency through the years and the judicial process of defining and enlarging the rule has rendered it less effective today than in the past. The doctrine has been riddled with so many exceptions that some authors say it is no longer a valid rule.⁹⁷ McCormick calls today's lay opinion rule not a rule of exclusion, but one of preference,⁹⁸ and Wigmore predicts that it will eventually disappear entirely.⁹⁹ Today's change in attitude towards the admission of opinion evidence indicates an increased confidence in the

⁹⁴*Id.* at 698, 187 So. at 895.

⁹⁵McCORMICK, *supra* note 11, at 22.

⁹⁶McELROY, *supra* note 1, § 35, at 160.

⁹⁷McCORMICK, *Opinion Evidence in Iowa*, *supra* note 31, at 273.

⁹⁸McCORMICK, *supra* note 11, at 23.

⁹⁹WIGMORE, *supra* note 6, § 1929, at 26.

capacity and ability of modern jurors to understand and evaluate the evidence.

The opinion rule remains active in Mississippi, however, and is still the cause of headaches for lawyers and witnesses alike. It is the contention of the author that the three-phase test suggested, requiring the showing of (1) necessity, (2) knowledge, and (3) competence, would clear the air concerning the admissibility of lay opinion testimony and would replace the confusing situation which exists today with a concise, collective statement of what the Mississippi Supreme Court has been saying for one hundred and fifty years.

Richard T. Phillips

RECENT DECISIONS

ANTITRUST EXEMPTIONS — PROFESSIONAL BASEBALL'S IMMUNITY FROM ANTITRUST REGULATION UPHOLD

Flood, a professional baseball player, after being traded to another club without his consent, asked Kuhn, the Commissioner of Baseball,¹ to make him a free agent, thereby placing him at liberty to negotiate with any other major league team. Kuhn, relying on the reserve system,² denied his request. Flood then instituted an action in federal district court alleging that the reserve system violated federal antitrust laws.³ The district court⁴ upheld the position of Kuhn and other defendants⁵ and denied the petitioner's claims. The appeals court affirmed this decision.⁶ On certiorari to the United States Supreme Court, *held*, affirmed. The long-standing antitrust exemption which baseball and its reserve clause have enjoyed is entitled to the benefit of stare decisis and the removal of any inconsistencies or the indication of any remedies is for congressional, not judicial, action. *Flood v. Kuhn*, 407 U.S. 258 (1972).

The first organized baseball game was played in the summer of 1846. The years that followed saw the sport become a highly organized structure with professional baseball as its highest achievement. The first antitrust challenge to baseball came in 1922 in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*.⁷ The

¹The Commissioner of Baseball has the sole power to approve contracts, trades, and other dealings among players and clubs in major league baseball.

²The reserve system was placed in baseball contracts in 1887. *See Metropolitan Exhibition Co. v. Ewing*, 42 F. 198, 202-04 (C.C.S.D.N.Y. 1890). The reserve system binds a player for the remainder of his career to the club with which he first signs; yet, the club has the right to confine the player under the system, to assign his contract, and to renew the contract unilaterally, subject to a stated salary minimum. *See generally* P. GREGORY, *THE BASEBALL PLAYER, AN ECONOMIC STUDY* 19 (1956); 2 H. SEYMOUR, *BASEBALL* 420 (1971); Eckler, *Baseball—Sport or Commerce?*, 17 U. CHI. L. REV. 56 (1949); Neville, *Baseball and the Antitrust Laws*, 16 FORDHAM L. REV. 208 (1947); Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

³The complaint charged violations of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964); the Clayton Act, 29 U.S.C. § 52 (1964) (federal antitrust laws); 18 U.S.C. §§ 1581, 1584 (1964); the Anti-Peonage Act, 42 U.S.C. § 1994 (1964) (federal civil rights laws); the thirteenth amendment; the Norris-La Guardia Act, 29 U.S.C. §§ 102, 103 (1964) (federal labor law); and the common law and state antitrust and civil rights laws of the various states where major league baseball is played. *Flood v. Kuhn*, 309 F. Supp. 793, 801-08 (S.D.N.Y. 1970).

⁴*Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970).

⁵The other defendants, though not all were named in each cause of action, were the presidents of the two major leagues and the twenty-four major league clubs. *Id.* at 272.

⁶*Flood v. Kuhn*, 443 F.2d 264 (2d Cir. 1971).

⁷259 U.S. 200 (1922).

Supreme Court noted that professional baseball was a business, but held that it was purely a state affair, and that the traveling of fans interstate to see a game and the movement of ball clubs across state lines were merely incidental and not essential to the business; therefore, professional baseball was not subject to federal antitrust laws. *Federal Baseball* was later cited several times by various members of the Court without disfavor.⁸ In 1953 in *Toolson v. New York Yankees, Inc.*,⁹ the Court cited *Federal Baseball* as controlling and held that professional baseball was not within the scope of antitrust laws. The Court found that Congress's awareness of the antitrust exemption and refusal to act, coupled with baseball's reliance on the exemption, and the potential retroactive effect of overruling *Federal Baseball* were factors which dictated that any remedy or correction should be made through legislation. The Court reaffirmed *Federal Baseball* in 1955 in *United States v. Shubert*¹⁰ and *United States v. International Boxing Club*.¹¹ In 1957, however, in *Radovich v. National Football League*,¹² the Court held professional football subject to the federal antitrust laws and specifically limited *Federal Baseball* to the business of organized professional baseball. The Court further stated that if it were considering the question of baseball for the first time, baseball would be held subject to the antitrust laws.¹³ The trend to hold all professional sports other than baseball subject to the federal antitrust laws continued in 1971 in *Haywood v. National Basketball Association*¹⁴ and *Denver Rockets v. All-Pro Management, Inc.*,¹⁵ where the Supreme Court and a federal appeals court, respectively, held that professional basketball was not exempt from federal antitrust regulation.

In the instant case the Supreme Court, after detailing the history of baseball and compiling virtually every pertinent writing and related case, found that baseball is a business engaged in interstate commerce. With its reserve system enjoying exemption from the federal antitrust laws, baseball has been an "exception," an "anomaly," and an "aber-

⁸United States v. Employing Plasterers Ass'n, 347 U.S. 186, 196-97 (1954) (Minton, J., dissenting); North Am. Co. v. Securities & Exch. Comm'n, 327 U.S. 686, 694 (1946); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 573 (1944) (Stone, C.J., dissenting); Hart v. B.F. Keith Vaudeville Exch., 262 U.S. 271 (1923).
⁹346 U.S. 356 (1953).

¹⁰348 U.S. 222 (1955). In reaffirming *Federal Baseball* the Court adhered to that case only to the extent that the decision determined that Congress had no intention of including baseball in the scope of the federal antitrust laws. *Id.* at 230. Actually the Court in *Federal Baseball* never made any reference to Congressional intent concerning baseball's relationship to the federal antitrust laws.

¹¹348 U.S. 236 (1955). This decision limited *Federal Baseball* by stating that it "did not hold that all businesses based on professional sports were outside the scope of the antitrust laws." *Id.* at 243.

¹²352 U.S. 445 (1957).

¹³*Id.* at 452.

¹⁴401 U.S. 1204 (1971).

¹⁵325 F. Supp. 1049 (C.D. Cal. 1971).

ration,"¹⁶ but it has been an established aberration recognized in all cases involving antitrust claims in professional sports.¹⁷ The Court declared that any unrealism, inconsistency, or illogic found in distinguishing baseball from other sports was justified by the continued reliance upon *Federal Baseball* and the "positive inaction"¹⁸ of Congress in allowing baseball's exempt status to continue.¹⁹ The Court summarily dismissed all other claims²⁰ and, citing *Toolson*, held:

Without reexamination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball* . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.²¹

By reenforcing the admittedly undistinguishable exemption granted to professional baseball, the Supreme Court stands in direct opposition to the current trend that all professional sports are to be governed by the federal antitrust laws.²² While the Court recognizes that the reserve system places restraints on trade and denies a player the right to seek employment from more than one employer, the actual effect of the

¹⁶407 U.S. at 282. These are the words used by the Court in describing the exemption.

¹⁷*Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971) and *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (Basketball); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966) (Golf); *Peto v. Madison Square Garden Corp.*, 1958 Trade Cases 69, 106 (S.D.N.Y. 1958) (Hockey); *Radovich v. National Football League*, 352 U.S. 445 (1957) (Football); *United States v. International Boxing Club*, 348 U.S. 236 (1955) (Boxing).

¹⁸407 U.S. at 283. Over fifty bills have been introduced in Congress concerning the relationship of baseball to the antitrust laws without Congress passing any of the bills. *Id.* at 281.

¹⁹There were two dissenting opinions by Justices Douglas and Marshall, both joined by Justice Brennan. Justice Douglas, who was on the Court when *Toolson* was decided, said he has "lived to regret" the decision. He stated that Congressional inaction should not prevent the Court from correcting its own fundamental error. *Id.* at 286-87. Justice Marshall contended that Congressional refusal to exempt other sports showed disapproval of the Court's decisions in regard to baseball. He suggested that collective bargaining and federal labor statutes may pre-empt the application of federal antitrust laws. *Id.* at 294-95. See Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971). There was also a concurring opinion by Chief Justice Burger in which he stated that Congressional inaction was not a solid base upon which to decide a case, but felt it to be the least undesirable. He called for action by Congress upon the baseball exemption. 407 U.S. at 286.

²⁰The Court found that state antitrust laws were precluded by application of the commerce clause. The Court found it unnecessary to consider other additional claims and arguments due to the decision reached by the Court. 407 U.S. at 284-85.

²¹*Id.* at 285.

²²See note 18 *supra*.

decision is to securely entrench baseball's reserve clause and to substantially guarantee the team owners' control over the players.²³ The decision is the latest in a line of decisions which have upheld baseball's exemption from antitrust regulation. The thoroughness of the Court's opinion creates an apparently impermeable judicial wall around baseball's antitrust exemption. The Court once again calls for legislative action in the area, but Congress has chosen not to act despite frequent opportunities to do so.²⁴ The resulting dilemma is that both the judiciary and the legislature refuse to take affirmative action in an area where antitrust violations abound. The ultimate irony of the decision is that the Court now asks the legislative arm of government to slay a monster created by the judicial branch.²⁵ Perhaps Congress, realizing that *Flood* in essence seals the judicial avenue to abolishing baseball's reserve system, will finally act to remove this illogical exemption from antitrust regulation. Yet it is highly unlikely that the negative stimulus of *Flood* will spur positive activity in Congress.²⁶

Should Congress fail to take prompt action, the door will be effectively closed to athletes wishing to escape the baseball reserve clause. The closing of this door could lead to the opening of another — application of federal labor laws to professional baseball and other professional sports. This area has yet to be explored, but some interest has arisen.²⁷ The development of labor unions in professional sports through which players bargain collectively and have the power to strike illustrates the use of labor tactics by players. When a group avails itself of labor tactics, it is not without merit to argue that labor laws should apply to the group's activities. Should federal laws be found applicable, federal antitrust laws would become irrelevant as applied to professional baseball. As the players are forced to use collective bargaining to compete with the powers of the owners, more aspects of labor relations and unions will develop. As a result, the professional athlete's future and the future of all professional sports could easily be governed by federal labor laws instead of federal antitrust laws.

Julian Fagan

²³See generally P. GREGORY, *supra* note 2; Eckler, *supra* note 2; Neville, *supra* note 2; Comment, *Monopsony in Manpower*, *supra* note 2; 25 Miss. L.J. 270 (1954).

²⁴407 U.S. at 285.

²⁵In deciding *Federal Baseball* the Court found that baseball was not engaged in interstate commerce, and therefore it was not subject to regulation under the federal antitrust laws. Thirty years later in *Toolson* the Court recognized the changes in baseball but said it was for Congress to subject baseball to antitrust regulation. In the instant case the Supreme Court admits baseball is a business and is engaged in interstate commerce. The Court concedes that baseball would be held subject to antitrust regulations were it not for the reliance of baseball upon the *Federal Baseball* and *Toolson* decisions. In effect the Court admits its mistake and says it would decide differently today on a clean slate, but refuses to correct its own error.

²⁶See note 19 *supra*.

²⁷See *Flood v. Kuhn*, 407 U.S. at 294-95; Jacobs & Winter, *supra* note 19.

CHURCH PROPERTY — MISSISSIPPI STATUTES WHICH AUTHORIZED
CIVIL COURTS TO RESOLVE INTERNAL CHURCH PROPERTY DISPUTES
ARE DECLARED UNCONSTITUTIONAL

A dispute between appellants¹ and appellees² over control of church properties in Jackson, Mississippi, arose when appellants decided to transfer appellee Williams, the pastor of the local congregation, to another church.³ Williams refused to move and a majority of the local members supported his staying as their pastor.⁴ Appellants then filed suit in chancery court claiming title to the church property⁵ and sought to enjoin appellees from occupying it. Appellees answered⁶ and relying

¹State Overseer, H.D. Sustar, and other officials of the General Church of God with headquarters in Cleveland, Tennessee.

The organizational structure of the Church of God is hierarchical, *i.e.*, it is governed by a national body constituted of representatives from the various local churches. A General Overseer and a General Assembly appoint State Overseers and State Trustees of property. The State Overseer appoints the pastors of local churches. Each local church is a member of the General Church and is governed by it. This hierarchical structure is in contrast to the congregational form of government which allows each local church to be autonomous. *See Note, Judicial Intervention In Disputes Over The Use of Church Property*, 75 HARV. L. REV. 1142, 1143-44 (1962) [hereinafter cited as *Judicial Intervention*].

²David Williams, pastor of the local church, and a majority of the local church members.

³Appellant Sustar claimed that he had been informed by telephone that pastor Williams would be shot unless he were moved.

⁴Nearly all of the local members signed a letter written to the General Overseer requesting Williams to stay and defying the parent church's authority to move him. Subsequently appellant Sustar read to the congregation a proclamation which disqualified the church as a member of the mother church and declared the property vacant.

⁵A copy of the deed was attached to the petition with the following habendum clause:

To have and to hold unto the said . . . Local Board of Trustees . . . subject above to the following limitations: The said Local Board of Trustees shall hold title to, manage and control the said real estate for the general use and benefit of the Church of God, having its general headquarters in Cleveland, Tennessee, and for the particular use and benefit of the local congregation. . . . If at anytime the Local Board . . . shall cease to exist or to perform its duties, then the State Overseer . . . shall have the power to declare all offices on the said Board vacant, and the State Board . . . shall automatically hold title. [*Sustar v. Williams*, 263 So. 2d 537, 538-39 (1972)].

⁶The chancellor allowed a majority of the local members to intervene in the litigation as beneficiaries of a religious trust. They alleged that by constituting at least a two-thirds majority of the congregation who had determined that a "deep-seated and irreconcilable hostility" existed between themselves and the mother church,

upon sections 1273-01 and 1273-02 of the Mississippi Code,⁷ alleged that they were entitled to an injunction to prevent appellants from interfering with their use of the property. The chancellor rejected appellants' constitutional challenge to these sections and awarded the property to the appellees.⁸ On appeal to the Mississippi Supreme Court, *held*, reversed. Where statutes authorize a majority of beneficiaries of a religious trust to divest the mother church of church property without regard to the habendum clause of the deed, and where those statutes authorize the court to determine if there is a "deep-seated disagreement" between a local and parent church, and where those statutes permit the court to appoint trustees of the church property, they violate article 3, section 18 of the Mississippi Constitution and the first amendment to the United States Constitution. *Sustar v. Williams*, 263 So. 2d 537 (Miss. 1972).

Standards to be employed in church property disputes were first articulated by the United States Supreme Court in *Watson v. Jones*.⁹ *Watson* established a rule that in a hierarchical polity, civil courts must accept as final the ruling of the highest church tribunal to which the matter was carried in questions of ecclesiastical doctrine or polity.¹⁰ Subsequent decisions have elevated this rule to constitutional status.¹¹ In contrast to the *Watson* line of cases, there had been imbedded in the common law a departure-from-doctrine standard of the implied trust

they were entitled to an injunction preventing appellants from interfering with the property under the authority of MISS. CODE ANN. §§ 1273-01, -02 (Supp. 1971).

⁷Section 1273-01 defines local beneficiaries as those residing in Mississippi who contributed all or part of the corpus of the trust and who locally and directly enjoy the benefits of the trust. This section defines a majority as 66⅔ percent. MISS. CODE ANN. § 1273-01 (Supp. 1971). Section 1273-02 permits this majority to exercise control over the trust when they and the chancery court determine that "a deep-seated and irreconcilable hostility" exists between them and any others in control of the trust. The court can discharge all in control and appoint other trustees with complete control over the property. MISS. CODE ANN. § 1273-02 (Supp. 1971).

⁸Appellants' plea in bar charging that these statutes were unconstitutional was overruled.

⁹80 U.S. (13 Wall.) 679 (1871). For exhaustive treatments of the significance of *Watson*, see Comment, *Judicial Intervention In Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113 (1965); *Judicial Intervention*, *supra* note 1.

¹⁰80 U.S. (13 Wall.) at 727. *Watson* set forth three categories in which civil courts could resolve church property disputes. First, where the church, according to the express terms of the instrument whereby it receives the property, is devoted to a specific doctrine, the court would see that the property was held to its intended use. Second, where the property is held by a church of congregational polity where no express trust is attached, the majority vote will determine the property use. Finally, the highest church adjudicatory in a hierarchical polity must control. *Id.* at 722-27.

¹¹*Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). *Watson* had been decided before the first amendment was made applicable to the states through the fourteenth amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

rule.¹² The implied trust rule impresses a trust on property contributed to a church in favor of the fundamental doctrines held by the church at the time the contributions were made.¹³ According to the departure-from-doctrine standard, in a dispute concerning the control of church property centering on claims of departure from the fundamental doctrines, civil courts will determine which faction is faithful to the trust and award the property to that group.¹⁴ However, the Supreme Court struck down the departure-from-doctrine element of the implied trust rule as violating the first amendment in *Presbyterian Church v. Hull Memorial Presbyterian Church*¹⁵ and established *Watson*¹⁶ as the constitutional standard.¹⁷ The Court said that since the departure-from-doctrine element of the implied trust rule requires an interpretation of the doctrine, it violates the first amendment command that civil courts decide church property disputes without resolving controversies of religious doctrine and practice.¹⁸ On remand the Georgia Supreme Court ruled in favor of the local congregations, basing its decision on a determination of the legal title to the property.¹⁹ Relying upon the Court's invalidation of Georgia's departure-from-doctrine element of the implied trust theory, the Georgia Supreme Court held that the entire implied trust theory must fall, thereby giving legal title of the property to the local congregations according to neutral property law.²⁰ The United States Supreme Court denied a petition for a writ of certiorari and allowed the decision to stand.²¹ On the same day the Court refused to consider a Maryland Court of Appeals decision in *Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*,²²

¹²Kauper, *Church Autonomy and the First Amendment: The Presbyterian Church Case*, 1969 SUP. CT. REV. 347, 349-50 [hereinafter cited as Kauper].

¹³*Id.* In the case of a hierarchical form of church government the trust would be in favor of the mother church. See Dusenberg, *Jurisdiction of Civil Courts over Religious Issues*, 20 OHIO ST. L.J. 508 (1959); 22 VAND. L. REV. 674, 676-77 (1969).

¹⁴Kauper, *supra* note 12, at 350. This rule is usually attributed to Lord Eldon's opinion in *Attorney General v. Pearson*, 36 Eng. Rep. 135 (Ch. 1817), which committed the English courts to a policy of determining questions of religious doctrine where property rights were in issue. Kauper, *supra* note 12, at 350.

¹⁵393 U.S. 440 (1969).

¹⁶80 U.S. (13 Wall.) 679 (1871).

¹⁷393 U.S. at 447-52.

¹⁸*Id.* at 449-50.

¹⁹*Presbyterian Church v. Hull Memorial Presbyterian Church*, 225 Ga. 259, 167 S.E.2d 658 (1969).

²⁰Jenkins, *Ownership of Church Property and the Doctrine of Implied Trusts*, 22 MERCER L. REV. 515, 519 (1971). *Hull* had held that neutral property principles could settle church property disputes as an alternative to the *Watson* approach so long as civil courts are not required to settle doctrinal issues. *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

²¹*Presbyterian Church v. Hull Memorial Presbyterian Church*, 396 U.S. 1041 (1970), *denying cert.* to 225 Ga. 259, 167 S.E.2d 658 (1969).

²²396 U.S. 367, 368 (1970) (appeal dismissed). For a discussion of this case, see Note, *Presbyterian Church v. Hull Memorial Presbyterian Church — Supreme*

where Justice Brennan, in concurring comments, said that a state may adopt any one of at least three approaches for settling church property disputes so long as it does not consider doctrinal matters. First, states may use the *Watson*²³ approach if the appropriate church governing body can be determined apart from resolving questions of doctrine and polity.²⁴ A second approach, according to Justice Brennan, is to employ neutral principles of property law which would resolve litigation by studying deeds, reverter clauses, and general state corporation clauses.²⁵ The third approach is the passage of special statutes to govern control of church property which would preclude state interference with church doctrine and polity.²⁶ The opinion cited *Northside Bible Church v. Goodson*²⁷ as an example of statutes which would violate the principle of non-interference.²⁸ In *Goodson* an Alabama statute,²⁹ similar to Mississippi's sections 1273-01 and 1273-02,³⁰ was found to be unconstitutional. Despite the existence of this constitutionally suspect statute, the Mississippi case law in this area³¹ is not significantly inconsistent with the rule and policy later established in *Hull*³² and clarified in *Eldership*.³³

After reviewing earlier decisions,³⁴ the Mississippi Supreme Court concluded in the case at bar that sections 1273-01 and 1273-02 of the

Court's Pronouncements Against a Civil Court's Determination of Church Doctrine in Property Disputes, 42 Miss. L.J. 276, 283 (1971) [hereinafter cited as *Presbyterian Church*].

²³80 U.S. (13 Wall.) 679 (1971).

²⁴396 U.S. at 370. Justice Brennan commented in a footnote that states following the *Watson* approach would have to find another ground for decision when identification of the relevant church governing body is impossible apart from considering church doctrine or polity. *Id.*

²⁵*Id.* Justice Brennan indicated, however, that if the application of the "formal title" doctrine requires courts to resolve religious questions, this doctrine may not be used in such cases.

²⁶*Id.*

²⁷261 F. Supp. 99 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967).

²⁸396 U.S. at 368.

²⁹ALA. CODE ANN. tit. 58, §§ 104-13 (Cum. Supp. 1969). This statute provided that 65 percent of the members of a local church could sever ties with the general church, nullify the trust clause of the deed made to the general church, and take the property.

³⁰Miss. CODE APP. §§ 1273-01, -02 (Supp. 1971).

³¹For a discussion of and citations to this line of cases, see *Presbyterian Church*, *supra* note 22, at 286.

³²393 U.S. 440 (1969).

³³396 U.S. 367 (1970).

³⁴The court reviewed its holding in *Linton v. Flowers*, 230 Miss. 838, 94 So. 2d 615 (1957), and then reviewed the holdings of the Supreme Court in *Maryland and Virginia Eldership v. Church of God*, 396 U.S. 367 (1970), and *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), which were based on *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). The court then reviewed the holding of the Fifth Circuit Court of

Mississippi Code were unconstitutional. Recognizing that *Hull*³⁵ held neutral property principles to be determinative of church property disputes when doctrine is not involved and noting that *Eldership*³⁶ directed the deed by which the church obtained the property to control its use if the deed limits the use by "express terms," the court found the statute to be unconstitutional since it permitted a majority of the beneficiaries of a religious trust to divest the mother church of property without regard to the habendum clause of the deed. Relying further upon the *Hull* requirement that a civil court could not decide the use of church property where the issue was based upon an interpretation of doctrine, the court further found the statute to be violative of article 3, section 18 of the Mississippi Constitution³⁷ and the first amendment to the United States Constitution³⁸ because it allowed courts to determine "deep-seated disagreements" regarding church doctrine. The court further found that the statute permitting the courts to appoint trustees of church property is unconstitutional, since it would constantly subject the courts to involvement in church disputes. Justice Robertson, in a specially concurring opinion, relied on *Goodson*³⁹ and found that since the statute would allow a two-thirds majority of the local congregation to come into civil court and cancel a solemn covenant of a recorded deed which sets forth an express trust in favor of the general church it is unconstitutional for that reason alone.⁴⁰

The present decision eliminates an anomalous statutory provision. Sections 1273-01 and 1273-02 stood in conflict with Mississippi's case law,⁴¹ and the first litigation of record under their authority has rendered them invalid. The sections authorized an undesirable state intrusion into religious matters by permitting courts to enter the obscure realm of church dogma to determine questions which are outside their area of expertise. Even though the decision works a hardship on those local churches which develop deep-seated disagreements with parent churches, it seems appropriate that these sections should fall. When local church members buy and work to construct church properties, it is arguable that they should be allowed to withdraw from the mother church

Appeals in *Northside Bible Church v. Goodson*, 387 F.2d 534 (5th Cir. 1967), and the holding of the Alabama Supreme Court in *First Methodist Church of Union Springs v. Scott*, 284 Ala. 571, 226 So. 2d 632 (1969).

³⁵393 U.S. 440 (1968).

³⁶396 U.S. 367 (1970).

³⁷MISS. CONST. art. 3, § 18.

³⁸U.S. CONST. amend. I.

³⁹387 F.2d 534 (5th Cir. 1967).

⁴⁰Justice Robertson was of the opinion that section 1273-03 was part and parcel of sections 1273-01, -02 and should fall with them even though it was not mentioned in the majority opinion. This section gives to the chancery court having jurisdiction of a removal of trustees proceeding "the full powers of a court of equity, competent to adjudicate any and all matters incidental to or collateral to the principle cause." MISS. CODE ANN. § 1273-03 (Supp. 1971).

⁴¹See, e.g., *Presbyterian Church*, *supra* note 22, at 286.

if they so choose,⁴² retaining and using the property to worship God according to their own consciences. On the other hand, to permit local churches to withdraw and take property from the parent church on a majority vote can only weaken the effectiveness of churches organized according to hierarchical structures and eventually destroy that form of government.⁴³ Religious associations must have some degree of authority to enforce ecclesiastical decisions upon local churches who voluntarily associate with them.⁴⁴ If a local church affiliates with and uses the name of a larger church organization, the local members should reasonably expect to follow the doctrine and policy of the larger group.⁴⁵ Courts should not intercede to support one side where parties have previously agreed that the general church would be authoritative.⁴⁶ The propriety of the hierarchical form of church government is a question, not for the civil courts, but for laymen and clergymen to decide within the church.⁴⁷ The position taken by the instant court is consistent with the American tradition of religious liberty and will properly leave the determination of the ownership and use of church properties to the highest church tribunal where there is a hierarchical form of church government.

William L. Youngblood

⁴²Jenkins, *supra* note 20, at 521.

⁴³*Id.*

⁴⁴Note, *Constitutional Law — Judicial Intervention In Church Property Disputes*, 44 TUL. L. REV. 370, 376 (1970). This article quoted Watson:

All who unite themselves to such a body [the general church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. [*Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871)].

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷Jenkins, *supra* note 20, at 521.

CONSTITUTIONAL LAW — ABORTION — STATUTE PROHIBITING ABORTION
VIOLATES WOMEN'S CONSTITUTIONAL RIGHT OF PRIVACY

Plaintiffs¹ filed a petition in federal district court requesting a declaratory judgment that the New Jersey abortion statute² and related statutes³ were unconstitutional and sought to enjoin their operation and enforcement.⁴ Plaintiffs contended that the statutes violate the right of privacy of women in choosing whether to bear a child or terminate a pregnancy.⁵ Plaintiffs further contended that this right of privacy includes the right to seek the services of physicians to perform abortions and that the challenged statutes violate the right of privacy in the physician-patient relationship as guaranteed by the ninth and fourteenth amendments. The state asserted that the statutes are justified for the protection of society's interest in regulation abortion.⁶ The three-judge federal district court,⁷ *held*, judgment for the plaintiffs but injunctive relief denied.⁸ Women have a constitutional right to seek an abortion, and where a state statute prohibits abortion without "lawful justifica-

¹Plaintiffs were nine physicians who filed the petition for themselves and on behalf of their women patients.

²N.J. REV. STAT. § 2A:87-1 (1951), which provides:

Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.

If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than 15 years, or both.

³N.J. STAT. ANN. § 45:9-16 (Supp. 1972), which provides, in part, that the State Board of Medical Examiners may suspend or revoke the license to practice medicine of any physician who practices criminal abortion or who has been convicted of the crime and criminal abortion. *See also* N.J. REV. STAT. §§ 2A:87-2: 170-76 (1951).

⁴Two of the plaintiff-physicians had been prosecuted under the challenged statutes and had suffered revocation of their licenses. These two plaintiffs sought the expunction of criminal records resulting from their convictions under the statutes and the reinstatement of their medical licenses.

⁵Plaintiffs also contended that the phrase "without lawful justification" provides inadequate notice of the sphere of conduct prohibited by the statute and that the statute is, therefore, unconstitutionally vague on its face. N.J. REV. STAT. § 2A:87-1 (1951).

⁶The state asserted that its interest in regulating abortions arises from the power of the state to regulate conduct inimical to the general welfare and the concept of protection of the embryo or fetus.

⁷*See* 28 U.S.C. §§ 2281, 2284 (1970).

⁸The court also held that prayers for the expunction of the criminal records and the return of the medical licenses of the two plaintiff-physicians seeking relief "verged" on injunctive relief. Therefore, this relief was also denied.

tion," that statute is unconstitutionally vague; and where state statutes provide for possible sanctions against a physician for performing a criminal abortion, these statutes violate the right of privacy in the physician-patient relationship. *Y.W.C.A. v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972).⁹

Under Roman law abortion with the consent of the father was legal. The concept underlying this early law was the hypothesis that a fetus is a part of the woman.¹⁰ At common law abortion prior to quickening¹¹ of the embryo was not a criminal offense.¹² However, legislation was enacted as early as 1803 which placed legal restrictions on all abortions.¹³ Eventually all states enacted legislation prohibiting abortions. The majority of states, however, subsequently liberalized their abortion statutes to allow abortions when necessary to preserve the life of the mother.¹⁴ In 1891 the United States Supreme Court first recognized a fundamental right of privacy not specifically enumerated in the Bill of Rights.¹⁵ Since that time subsequent decisions of that court and of the lower courts have continually expanded that right. In *Meyer v. Nebraska*¹⁶ the Court held that the fourteenth amendment encompassed a right to marry, establish a home, and bring up children. The Court recognized a constitutional right to procreation in *Skinner v. Oklahoma*

⁹This decision actually encompassed two cases, *Y.W.C.A. v. Kugler*, and *Abramowitz v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972), which were consolidated for hearing. All plaintiffs in *Abramowitz* and those in *Y.W.C.A.* who brought suit as individuals and on behalf of organizations which they claimed to represent were held to lack standing to sue.

¹⁰48 J. URBAN L. 969, 970 (1971).

¹¹The period of the unquickened fetus runs from conception to the sixteenth or eighteenth week of pregnancy. Quickening is marked by interuterine movements of the fetus perceived by the mother. *STEDMAN'S MEDICAL DICTIONARY* 1340-41 (21st ed. 1966).

¹²48 J. URBAN L. 969, 970 (1971). The author states, however, that abortion after quickening was a misdemeanor at common law; cf. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Arise From the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?*, 17 N.Y.L.F. 335, 373 (1971) [hereinafter cited as Means], which states that during the late seventeenth, the entire eighteenth, and early nineteenth centuries, English and American women were totally free from all restraints in regard to the termination of unwanted pregnancies at any time during gestation.

¹³48 J. URBAN L. 969, 971 (1971), which states that England passed such legislation in 1803. See also Comment, 20 AM. U. L. REV. 136, 140 (1970), which states that in 1821 Connecticut enacted the first statute in the United States prohibiting abortions.

¹⁴Comment, 20 AM. U. L. REV. 136, 140 (1970).

¹⁵*Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) (plaintiff was held to have a right to the "possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

¹⁶262 U.S. 390 (1923).

ex rel. Williamson.¹⁷ In *Griswold v. Connecticut*¹⁸ the Court first articulated the theory that the ninth amendment could contain fundamental rights not enumerated in the first eight amendments to the Constitution.¹⁹ In that case a statute which made it a criminal offense for any person to use any drug, medicinal article or instrument for the purpose of preventing conception was held unconstitutional as an unreasonable interference with the right of marital privacy. Since the time of the decision in *Griswold*, there has been a line of cases, beginning with *People v. Belous*,²⁰ in which state abortion statutes have been challenged as unconstitutional infringements upon a woman's fundamental right to terminate an unwanted pregnancy and upon the fundamental right to obtain the aid of a physician to perform the service.

In the present case the court first considered the constitutionality of the challenged phrase "without lawful justification" and found it to be unconstitutionally vague on its face.²¹ The court reviewed the history and development of the fundamental right of privacy in matters related to marriage, sex, childbearing, childrearing and education, and analyzed recent lower court decisions which have expanded the scope of this right. The court concluded that a woman has a constitutional right of privacy cognizable under the ninth and fourteenth amendments to determine whether to bear a child or to terminate a pregnancy in its early stages. This right can be intruded upon by the state only if there is a compelling state interest which overrides the private right of the individual. The considerations of health and safety of the mother and the interest of the state in controlling sexual behaviour and population growth were held to no longer constitute compelling grounds to justify a restrictive statutory scheme in the area of abortion. The argument that the state has a compelling interest in preservation of the life of the embryo or fetus was then declared by the court to be beyond the competence of judicial resolution.²² The court, therefore,

¹⁷316 U.S. 535 (1942).

¹⁸381 U.S. 479 (1965).

¹⁹2 TEX. TECH L. REV. 99, 100 (1970).

²⁰71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), in which the court held that "[t]he fundamental right of the woman to choose whether to bear children follows from the [United States] Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

²¹The court concluded that the New Jersey abortion statute, N.J. REV. STAT. § 2A:87-1 (1951), chills and deters the plaintiff-physicians in the exercise of protected first amendment activities; and that it violates plaintiff-physicians' rights under the fourteenth amendment to freely practice the profession of their choice. Judge Garth, however, in a dissenting opinion found no distinguishing characteristic between the New Jersey abortion statute as interpreted by the Supreme Court of New Jersey and the statute held to be constitutionally definite by the United States Supreme Court in *United States v. Vuitch*, 402 U.S. 62 (1971). 342 F. Supp. at 1066-67.

²²Judge Garth, in his dissenting opinion, concludes that the state has a compelling interest in the preservation of life, including fetal life; therefore, the

concluded that the state did not have the requisite compelling interest to override a woman's right of privacy to choose whether to bear a child or to terminate a pregnancy in its early stages. The court further concluded that since women have a constitutional right to seek an abortion, it necessarily follows that performance of such services by physicians cannot be prohibited by the statutes in question.

The present case is another decision in a growing trend which recognizes a woman's fundamental right to terminate an unwanted pregnancy. The abortion statutes of the majority of states have been criticized as unreasonable infringements upon a woman's fundamental right to plan the size of her family and to avoid the birth of a deformed child or a child who is the product of incest or rape. Therefore, those statutes have been denounced as risking the physical and mental well being of a woman by forcing her to carry a pregnancy to term.²³ Any statute designed to regulate the procurement of abortions must restrict its scope to compelling state interests.²⁴ The issue which must be resolved in the area of abortion law is that of determining what constitutes a compelling state interest. All authorities recognize a compelling state interest in insuring that all abortions are performed by competent persons in adequate surroundings. The court in the present case and the courts of other jurisdictions have relied primarily upon the legislative history of abortion statutes in holding them to be unconstitutional. These courts and other authorities state that the sole legislative purpose behind abortion statutes was the protection of pregnant women from the dangers imposed by medical conditions prevailing at the time such statutes were enacted.²⁵ At the time states began enacting legislation restricting abortion, the danger to the life of a woman who obtained an abortion was ten to fifteen times greater than that to the life of a woman who gave birth at full term.²⁶ Under modern medical conditions, however, the danger to the life of a woman who gives birth at full term is eight times the danger to the life of a woman who obtains an abortion.²⁷ Many authorities therefore conclude that the nineteenth century abortion laws no longer effectuate their original purpose, but, in fact, actually frustrate that purpose. These authorities conclude that this frustration of legislative purpose renders abortion statutes unconstitutional.²⁸ Nevertheless, other courts have been unwilling to resolve the problem on the issue of legislative purpose.²⁹ Perhaps the most controversial problem that continues to arise in cases challenging the constitutionality of abortion statutes is balancing the

statute in issue was held by him not to interfere unconstitutionally with the fundamental right of a woman to choose whether to bear children or to terminate a pregnancy. 342 F. Supp. at 1082.

²³48 J. URBAN L. 969, 977 (1971).

²⁴Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970).

²⁵Means, *supra* note 12, at 336.

²⁶*Id.* at 383.

²⁷*Id.* at 387.

²⁸People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969).

²⁹See, e.g., Means, *supra* note 12.

rights of the mother against the rights of the fetus. It is clear that a woman's right to life has always taken precedence over any interest the state may have in the unborn.³⁰ When the mother's life is not in danger, however, the courts are divided on this issue. Many courts have been unwilling to hold that the fetus has any rights during the early stages of pregnancy. Recent judicial decisions³¹ and legislative enactments appear to be returning to the concept of quickening as the stage of pregnancy in which the fetus acquires rights.³² Other courts have held that the embryo or fetus has rights from the moment of conception.³³ These courts conclude that there is a compelling state interest in the protection of the life of such embryo or fetus. The rights of the fetus, of course, must be weighed against those of the mother. Therefore, statutes prohibiting abortions, except those abortions necessary to preserve the life of the mother, have been held by some courts not to infringe upon the rights of the mother. The controversy which has arisen under present abortion statutes can best be resolved by legislation, rather than judicial proceedings. The legislatures of all states should consider these issues and enact legislation setting forth with specificity the respective rights of the fetus and of the mother.

Lawrence E. Allison, Jr.

³⁰*See, e.g.*, cases cited note 33 *infra*.

³¹*See, e.g.*, *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970); *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969).

³²Comment, 20 AM. U. L. REV. 136, 148 (1970). *See also* Means, *supra* note 12, at 403, which observes that "[t]here is no evidence that the framers of the Constitution and the Bill of Rights intended that a fetus be considered to be a 'person' within the meaning of the Constitution and the Bill of Rights."

³³*See, e.g.*, *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971); *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970).

CONSTITUTIONAL LAW — ADDITUR IS PERMISSIBLE
UNLESS TRIAL COURT MANIFESTLY ABUSES ITS DISCRETION

Thorn, a forty-two year old traveling salesman, sued Biloxi Electric Company for personal injuries arising out of an automobile accident in which his automobile was struck from the rear. The jury returned a verdict of \$6,500.00 in favor of Thorn, who thereupon moved the court for a new trial, claiming inadequacy of damages.¹ The trial court found the verdict to be inadequate and contrary to the overwhelming weight of the credible evidence and, in addition, that bias, prejudice, or passion on the part of the jury had influenced the judgment. The court, acting under the provisions of section 1686.5 of the Mississippi Code,² entered an order providing that unless an additur³ was accepted increasing the amount of the judgment to \$12,500.00, a new trial limited to the issue of damages would be granted. Biloxi Electric Company refused to accept the additur order, and the trial court thereupon ordered the new trial. The company appealed contending that the trial court had manifestly abused its discretion in the ordering of the

¹Miss. CODE ANN. § 1536 (1956) provides:

Every new trial granted shall be on such terms as the court shall direct; and no more than two new trials shall be granted to the same party in any cause. Provided, however, that when the sole ground for a new trial is the excessiveness or inadequacy of damages assessed, the party aggrieved may elect to appeal from the order granting a new trial.

²Miss. CODE ANN. § 1686.5 (Supp. 1971), as originally passed by the legislature in 1971, and under which this case was decided, provided:

The Supreme Court or any other court of record in a case in which money damages were awarded may overrule a motion for a new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of the credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only.

This section was amended during the 1972 session of the legislature and the following provision was added:

If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur.

³Additur or increscitur, as it has also been described, is the power of a court, on motion for a new trial due to inadequate damages rendered by jury verdict, to require the defendant to consent to an increase in the award to a stipulated amount as a condition for denial of the motion for a new trial. *See generally* Comment, *Statutory Authorization of Additur and Remittitur*, 43 Miss L.J. 107 (1972).

new trial.⁴ On appeal to the Supreme Court of Mississippi, *held*, reversed and judgment of \$6,500.00 reinstated. A trial court may, in a proper case, enter an additur order under section 1686.5 of the Mississippi Code; but where a new trial is ordered after the refusal of an additur, the Mississippi Supreme Court will reverse if it can be shown that the trial court manifestly abused its discretion. *Biloxi Electric Co., Inc. v. Thorn*, 264 So. 2d 404 (Miss. 1972).

Mississippi has long recognized that a trial court has the power to enter a remittitur order, *i.e.*, to condition the denial of a motion for a new trial due to excessive damages upon the plaintiff's consent to a remission in the award to a specified amount.⁵ Remittitur has repeatedly been approved in cases involving unliquidated or disputed damages.⁶ However, the status of additur in Mississippi, as elsewhere, has been the subject of much controversy.⁷ The practice of additur in federal courts in actions involving unliquidated damages was held by the United States Supreme Court in *Dimick v. Schiedt*⁸ to be unconstitutional as it deprives the plaintiff of his right to trial by jury⁹ under the seventh amendment to the United States Constitution.¹⁰ Initially, a trial court in Mississippi had no authority to add to or increase the

⁴As will be discussed in the text hereafter, additur, where unliquidated or disputed damages are involved, has been rejected in Mississippi. See *Woodmansee v. Garrett*, 247 Miss. 148, 153 So. 2d 812 (1963).

⁵*Houston v. Page*, 208 So. 2d 901 (Miss. 1968); *Dennis v. Berryman*, 200 So. 2d 437 (Miss. 1967); *Dendy v. City of Pascagoula*, 193 So. 2d 559 (Miss. 1967); *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966); *Capital Transp. Co. v. Segrest*, 254 Miss. 168, 181 So. 2d 111 (1965); *Rayner v. Lindsey*, 243 Miss. 824, 138 So. 2d 902 (1962); *Thomas v. Fleming*, 241 Miss. 26, 128 So. 2d 854 (1961); *Motors Ins. Corp. v. Lenior*, 218 Miss. 348, 67 So. 2d 381 (1953); *Case v. Yazoo & M.V.R.R.*, 114 Miss. 21, 74 So. 773 (1917); *Hurd v. Germany*, 8 Miss. 675 (1843); *Young v. Englehard & Silverberg*, 2 Miss. 19 (1834).

⁶*Houston v. Page*, 208 So. 2d 901 (Miss. 1968); *Dendy v. City of Pascagoula*, 193 So. 2d 559 (Miss. 1967); *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966); *Rayner v. Lindsey*, 243 Miss. 824, 138 So. 2d 902 (1962); *Thomas v. Fleming*, 241 Miss. 26, 128 So. 2d 854 (1961).

⁷See generally Comment, *Statutory Authorization of Additur and Remittitur*, *supra* note 3.

⁸293 U.S. 474 (1935).

⁹The Court pointed out that the question of damages is a question of fact, and since the power to determine questions of fact lies within the province of the jury, a federal court's action of increasing an award of damages constitutes a re-examination of a fact tried by a jury and violates the seventh amendment. 293 U.S. at 486.

¹⁰U.S. CONST. amend. VII provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The seventh amendment has not been incorporated into the due process clause of the fourteenth amendment and is therefore not binding on the states. Comment, *Statutory Authorization of Additur and Remittitur*, *supra* note 3, at 112 & n.39.

amount of a verdict returned by a jury. Such action was deemed an invasion of the province of the jury.¹¹ In 1922, however, the Mississippi Supreme Court began a gradual retreat from this position when it allowed a trial judge to assess damages in the amount for which suit was brought after a jury had returned a verdict in general terms and failed to mention the amount of their verdict in favor of the plaintiff.¹² Subsequently, the court began to formulate the position that in order to show the true amount due, a trial court could add to or increase a jury's verdict where the damages sought were either liquidated, undisputed, or capable of determination by mathematical calculation and computation.¹³ In *Woodmansee v. Garrett*,¹⁴ decided in 1963, the Mississippi Supreme Court considered the question of extending the authority of a trial court to increase the jury's verdict to cases involving unliquidated or disputed damages. Noting that such action is violative of the constitutional right to trial by jury¹⁵ where the party prejudiced does not consent thereto, the court refused to recognize the power to increase the verdict in such cases.¹⁶ In an effort to circumvent the *Woodmansee* rule, in 1971 the Mississippi legislature enacted section 1686.5 of the Mississippi Code which by its terms appears to be absolute so as to encompass cases in which unliquidated and disputed damages are present.¹⁷

In *Thorn*, the Mississippi Supreme Court primarily held that on appeal it will not upset whatever action a trial court has taken with

¹¹*Buck v. Little*, 24 Miss. 463 (1852).

¹²*Stone-Lowe Cotton Co. v. Weil Bros.*, 129 Miss. 60, 91 So. 859 (1922).

¹³*City of Indianola v. Love*, 227 Miss. 156, 85 So. 2d 812, 86 So. 2d 871, 87 So. 2d 870 (1956); *Ruffin v. J. & M. Schwabacher, Ltd.*, 156 Miss. 326, 126 So. 14 (1930); *Collins v. Carter*, 155 Miss. 600, 125 So. 89 (1929). The formulation of this position was completed in 1963 when the *Woodmansee v. Garrett*, 247 Miss. 148, 153 So. 2d 812 (1963), the court announced:

[W]e have come to the conclusion that where the amount in question is undisputed or liquidated, or the damage is fixed by law, or where the amount due may be determined by mathematical calculation, including interest, the trial court, or this Court on appeal, may add to the verdict of the jury so as to show the true amount due. [247 Miss. at 156, 153 So. 2d at 816].

¹⁴247 Miss. 148, 153 So. 2d 812 (1963).

¹⁵Miss. CONST. art. 3, § 31 provides: "The right to trial by jury shall remain inviolate."

¹⁶The court in *Woodmansee* apparently failed to grasp the fact that the party prejudiced in the case of additur is the defendant, not the plaintiff, when it stated:

[T]he trial court cannot add to the verdict of the jury an additional sum as damages in unliquidated claims, nor can the trial court bind the plaintiff in a damage suit by adding to the verdict of the jury an additional award so as to circumvent the necessity of a new trial where the jury has returned an inadequate award of damages, and where a motion is made for a new trial on that ground. [247 Miss. at 157, 153 So. 2d at 816.]

¹⁷See note 2 *supra*. The phrase "case in which money damages were awarded" should reasonably be interpreted to mean all damages including disputed or unliquidated damages, in addition to those which are undisputed, liquidated, ascertainable by fixed rules of law, or determinable by mathematical calculation.

respect to ruling on a motion for a new trial unless the trial court's action amounts to a manifest abuse of discretion.¹⁸ The court, however, also addressed itself to section 1686.5 and its additur provisions. Noting that "[t]he power of additur is new to the courts of our State,"¹⁹ the court concluded that the legal principals upon which remittitur and additur are based are identical.²⁰ In amplification of this similarity, the court reasoned that since a verdict to be deemed excessive and warrant a remittitur must be so gross as to be "flagrantly outrageous and extravagant," the same standard would apply as to whether a verdict is inadequate and warrants an additur order. Finding that the damages awarded Thorn were not so inadequate as to meet this standard, the court held that in granting the new trial the lower court had manifestly abused its discretion. The court concluded that no inference should be drawn that it unfavorably viewed the use of an additur order where the requirements of section 1686.5 are met²¹ and such action serves to foster the statute's legislative purpose of relieving crowded dockets and bring litigation to an early conclusion.

The endorsement by the Mississippi Supreme Court of the additur provisions of section 1686.5 in the present case, while completely ignoring its prior position regarding the use of additur in the trial courts of this state, serves as a basis for questioning the validity of the *Woodmansee* decision. Although the holding in *Woodmansee* requires the consent of the plaintiff to an additur order, the language of the statute providing that if the additur order "be not accepted then the court may direct a new trial on damages only" viewed in light of *Thorn*, indicates that the court may now define the term "additur" in its conventional sense²² and require that acceptance be made only by the defendant. Since the court has now acknowledged that "[t]he legal principles involved with additur are the same as those involved with remittitur," it is inconsistent and illogical that any restriction be placed on one and not on the other. In view of this position, the court has apparently laid a foundation for a rejection of any distinction between the two concepts. As a modern device which fosters judicial efficiency and economy while retaining the essentials of the right to trial by jury,²³ the additur practice can help relieve the overcrowded dockets

¹⁸*Dendy v. City of Pascagoula*, 193 So. 2d 559, 564 (Miss. 1967), cited in *Biloxi Elec. Co., Inc. v. Thorn*, 264 So. 2d 404 (Miss. 1972).

¹⁹264 So. 2d 404, 405 (Miss. 1972). As indicated in the text, this statement is only partially correct. The power of additur has been allowed in Mississippi except where the damages are unliquidated or disputed.

²⁰*Id.* This conclusion on the part of the court is enlightening since it ignored this common basis in *Woodmansee v. Garrett*, 247 Miss. 148, 153 So. 2d 812 (1963).

²¹See note 2 *supra*.

²²See Bender, *Additur — The Power of the Trial Court to Deny a New trial on the Condition That Damages Be Increased*, 3 CALIF. W. L. REV. 1 (1967); Comment, *Statutory Authorization of Additur and Remittitur*, *supra* note 3.

²³*Jehl v. Southern Pac. Co.*, 66 Cal. 2d 821, 427 P.2d 933, 994-95, 59 Cal. Rptr. 276, 282-83 (1967), noted in 8 SANTA CLARA LAW. 123 (1967).

of the trial courts of this state. It is hoped that the present thinking of the Mississippi Supreme Court with respect to additur will continue, and when a challenge by a non-consenting plaintiff to the validity of the additur provisions of section 1686.5 is presented before it, the court will reject that challenge and overrule its mistake in *Woodmansee*.

S. T. Rayburn

CONSTITUTIONAL LAW: FREE TEXTBOOK AID TO
SEGREGATED PRIVATE SCHOOLS IS CONSTITUTIONAL

Plaintiffs¹ sought a federal district court injunction which would, *inter alia*, prohibit application of a state statute² and related Textbook

¹Plaintiffs in this class action were four black students attending public school in Tunica County, Mississippi, who filed suit through their parents as next friends. Defendants were members of the Mississippi State Textbook Purchasing Board and the full-time executive secretary of that board. Board members are the governor, the state superintendent of education, and three others appointed by the governor for terms of four years. The events leading these particular plaintiffs to file suit are of more than passing interest.

On January 23, 1970, the United States District Court for the Northern District of Mississippi entered an order requiring the integration of all public schools of Tunica County, Mississippi, no later than February 2, 1970, in accordance with standards established by the United States Supreme Court in *Green v. County School Bd.*, 391 U.S. 430 (1968), and later in *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) (ordering mid-year integration). According to deposition evidence subsequently before the court, *all* white students of Tunica County then withdrew from the public schools and formed a private academy housed in church facilities. The principal and seventeen of twenty-one high school teachers of the Tunica County system resigned in mid-school-year to assume positions with the new private school, continuing to receive their salaries from the then re-segregated public school system until this practice was enjoined and restitution ordered in the *United States v. Tunica County School Dist.*, 323 F. Supp. 1019 (N.D. Miss. 1970), *aff'd*, 440 F.2d 377 (5th Cir. 1971).

On December 4, 1969, shortly after the Supreme Court's decision in *Alexander v. Holmes County Bd. of Educ.*, the executive secretary of the Mississippi Textbook Purchasing Board, circulated a memorandum to "County and Separate District Superintendents" which stated:

Subject: Textbooks for private schools

We have many disturbed parents since the Court decisions. Many of them are going to organize private schools, and they are going to need books. Since all the money has been allotted for this year, it will be necessary for the superintendents to transfer books with the student as he transfers to the private school. . . .

We appreciate your cooperation in this difficult situation.

In this manner, state-owned textbooks used by white students avoiding integration of Tunica County Public Schools were transferred to private segregated academies in January, 1970. Suit was filed October 8, 1970.

²MISS. CODE ANN. § 6656 (1952). See generally MISS. CODE ANN. §§ 6634, *et seq.* (1952); *Id.* §§ 6641, 6642 (Supp. 1971).

Board regulations³ providing for the distribution and loan of free state-owned textbooks to pupils in all elementary and high schools in the state.⁴ The particular practices of application challenged were the provision of free textbooks to white students attending private, racially segregated academies formed in the wake of public school desegregation. Plaintiffs claimed that the specific application of the statute was unconstitutional as a denial of equal protection under the fourteenth amendment.⁵ The three-judge district court,⁶ *held*, for defendants and

³The board regulations for distribution of state-owned textbooks made no distinction between private and public schools from 1940 to 1970. Each county superintendent of education was required to requisition textbooks from the Textbook Purchasing Board for all schools, public and private, geographically located within his county. After approval by the board, the School Book Depository shipped books directly to the consignee specified by the county superintendent of education.

In 1970, however, Congress enacted the Emergency School Assistance Act appropriating funds to aid school districts converting to unitary systems. The act makes it unlawful for any recipient district to "engage . . . in the gift, lease or sale of real or personal property or services to a non-public elementary or secondary school or school system practicing discrimination on the basis of race, color or national origin." Pub. L. No. 91-380 (1 U.S. CODE CONG. & AD. NEWS 942-45 (1970)). As a result public school officials wishing to participate in this federal program were obliged to disassociate themselves from the private segregationist academies.

Thereafter, on October 14, 1970, six days after the instant suit was filed, the Textbook Board established new distribution regulations which eliminated county superintendents, *et al.*, as administrators for the distribution of textbooks to private academies, substituting instead, a direct relationship between the administrative heads of the private schools and the Textbook Board itself. *See Norwood v. Harrison*, 340 F. Supp. 1003, 1006-07 n.2 (N.D. Miss. 1972).

⁴The case was submitted to the district court on the basis of stipulations, depositions, briefs, and oral argument on July 9, 1971, ostensibly to resolve the issue presented before the start of school in September, 1971, since relief sought, should plaintiffs have prevailed, anticipated the recall of textbooks already in use by private academies. The instant decision, however, was not rendered until April 17, 1972.

⁵Plaintiffs claim, *inter alia*, was that the furnishing of state-owned textbooks to private, racially segregated schools and academies formed for the purpose and having the effect of providing white students with an alternative to racially integrated and otherwise non-discriminatory public schools impeded plaintiffs' right to the affirmative establishment of racially integrated public schools. Such practice, they argued, citing particularly *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), constitutes impermissible state aid and encouragement to racially segregated education.

In *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969), the court's finding of fact determined a number of private schools to be racially discriminatory. *See also Green v. Kennedy*, *supra* at 1134. Virtually all the schools so adjudged were participating in the state textbook program at the time of argument in this case, although a number had withdrawn shortly after this suit was filed, apparently to avoid possible adverse effects of the recall sought. *See note 4 supra*.

Plaintiffs filed an elaborate chart, "Interdependence of Public School Desegregation and Formation and Growth of Private Academies," which summarized

dismissed the complaint. A state's legitimate interest in the education of all its youth is a sufficient justification for the state to administer a free textbook program, and such a program and its statutory authorization are not constitutionally invalid. *Norwood v. Harrison*, 340 F. Supp. 1003 (N.D. Miss. 1972).

It has traditionally been held permissible⁷ for states⁸ to provide free textbooks to pupils in public school where there is constitutional or statutory authority.⁹ Nevertheless, there has been much controversy where free textbooks are furnished by the state to pupils enrolled in private schools. Where the controversy has involved parochial private schools, the first amendment establishment clause must be considered.¹⁰ The early cases involving state aid to parochial schools¹¹ did not, however, involve first amendment establishment clause considerations since the Supreme Court had not yet made the first amendment applicable to the states through the fourteenth amendment.¹² The predominant theory arising out of these cases was the "child" or "pupil" benefit theory.¹³ Simply stated, the theory says "that the state may extend certain welfare

evidence contained in the stipulations and depositions before the court, and asked the court to adjudge, on a school by school basis, other private schools as being racially discriminatory and as having been formed for the purpose of providing white students with an alternative to racially integrated, non-discriminatory public schools as *Coffey* and *Green* had done. Of the 148 specifically named academies against which plaintiffs sought relief, 107 were receiving textbooks and another 41 were eligible but not participating in the state's program.

⁶Since this suit challenged the constitutionality of a statute that was applied statewide, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (1970). The court consisted of Judges Coleman, Keady, and Smith.

⁷Validity of this type of program has been challenged on such grounds as: (1) a violation of state law forbidding gifts of public money, or things of value to individuals; see *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929); (2) a taking of property without due process; see *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930); and (3) a violation of the state constitution forbidding the taxing of municipal corporations for municipal purposes; see *MacMillan Co. v. Clarke*, 184 Cal. 491, 194 P. 1030 (1920).

⁸See 20 U.S.C. § 825 (1970) (federal textbook program for state elementary and secondary, public and private schools).

⁹Annot., 67 A.L.R. 1196 (1930); Miss. CODE ANN. §§ 6634, *et seq.* (1952).

¹⁰U.S. CONST. amend. I states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

¹¹*Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930); *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929).

¹²*Cantwell v. Connecticut*, 310 U.S. 296 (1940) (first amendment made applicable to the states by incorporation through the fourteenth amendment).

¹³*Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929), was the first case to use the child benefit theory. An act of the Louisiana legislature setting aside public funds for the purchase of textbooks for all school children in the state regardless of what school they attended was upheld. See also 13 J. PUB. L. 76, 80 (1964).

aid to students attending church-related schools in situations where general aid to the parochial schools themselves would be unconstitutional."¹⁴ Where the theory has been rejected, either expressly or impliedly, it has been "in favor of a finding that such aid accrues to the benefit of the schools themselves, and hence of the religion or religious body maintaining the schools."¹⁵ Again the Supreme Court was confronted with the child benefit theory in *Everson v. Board of Education*,¹⁶ and the Court upheld a New Jersey statute¹⁷ that allowed local school districts to set up programs for transportation of children to school, including private schools. The Court said that the legislation was a public measure enacted to improve the general welfare.¹⁸ The child benefit theory, although not expressly mentioned by the Court in *Everson*, was obviously an essential aspect in the Court's determination.¹⁹ In the years following the *Everson* decision, there were several state court decisions concerning state aid to parochial schools in the form of textbooks and bus transportation.²⁰ In most of these cases such aid was held to be violative of the respective state constitutions.²¹ As these decisions and the opinion by Chief Justice Burger in *Walz v. Tax Commission*²² point out, the law in this area was ambiguous. It was in this light that the Supreme Court decided *Board of Education v. Allen*,²³ which upheld a New York law²⁴ requiring the lending of free textbooks to pupils in private as well as public schools. Justice White, speaking for the Court, reaffirmed the child benefit theory by characterizing the legislation as benefitting the parent and child, not the school.²⁵ In the recent case of *Lemon v. Kurtzman*²⁶ the Court found that state aid (state reimbursements of non-public elementary and secondary schools for costs of teachers' salaries, textbooks, and instructional material) to parochial schools had gone so far as to entangle government with religion.²⁷ The aid, therefore, inured to the benefit of the school as opposed to the child or parent.

¹⁴13 J. PUB. L. 76, 79 (1964).

¹⁵Annot., 93 A.L.R.2d 986, 987 (1964). See also *Smith v. Donahue*, 202 App. Div. 656, 195 N.Y.S. 715 (1922); *Dickman v. School Dist. No. 62c*, 232 Ore. 238, 366 P.2d 533, cert. denied, 371 U.S. 823 (1961); *Haas v. Independent School Dist.*, 69 S.D. 303, 9 N.W.2d 707 (1943).

¹⁶330 U.S. 1 (1947). This was also the first case in which state aid to parochial schools was "measured" by the establishment clause.

¹⁷N.J. STAT. ANN. § 18A: 39-1 (1941).

¹⁸330 U.S. 1, 18 (1947).

¹⁹37 FORDHAM L. REV. 123, 125 n.22 (1968).

²⁰13 J. PUB. L. 76, 81 n.31, 87-88 nn.59 & 61 (1964).

²¹*Id.* Of the five state courts which have considered textbook aid to parochial schools in light of their state constitutions, only Mississippi has upheld such aid. *Chance v. Mississippi State Textbook Rating and Purchasing Bd.*, 190 Miss. 453, 200 So. 706 (1941).

²²397 U.S. 664 (1970).

²³392 U.S. 236 (1968).

²⁴N.Y., EDUC. LAW § 701 (McKinney Supp. 1967).

²⁵392 U.S. at 243-44. See also 37 FORDHAM L. REV. 123, 126-27 & n.30 (1968).

²⁶403 U.S. 602 (1971).

²⁷*Id.* at 614, 625.

Aid to private, non-sectarian schools, most notably those in the South, has been attacked on several grounds. Tuition grants from the state to individual parents and children have generally been held to violate the equal protection clause of the fourteenth amendment in that they have fostered the establishment of racially segregated private schools.²⁸ A further attack was aimed at the tax exempt status afforded these racially discriminatory private schools by the Internal Revenue Service, and as a result, these schools lost this status with the decision of *Green v. Kennedy* in 1970.²⁹

The court in the present case, speaking through Circuit Judge J. P. Coleman, found that since the issuance of the free textbooks to pupils in church-related private schools is not an establishment of religion in violation of the first amendment³⁰ and since such a program is not direct aid to the school but to the individual student,³¹ the Mississippi textbook program administered pursuant to a thirty-two year old statute³² is not constitutionally invalid. The court refused to apply a more stringent standard to determine what constitutes aid to a private school under the fourteenth amendment than the standard presently applied under the first amendment.³³ The court, therefore, felt that the state has a legitimate interest in educating all of its youth, no matter what school they may choose to attend, and this state interest is sufficient justification for the administration of a free textbook program which includes not only public school students but all private school students.³⁴

The present case, although involving an equal protection problem, was decided on the basis of principles expounded in religious cases involving the first amendment.³⁵ The plaintiffs had asked the court to apply a stricter standard of review in a case involving racial discrimination than has traditionally been applied in cases where the establishment of religion has been at issue. The effect of applying such a standard would be to classify what has traditionally been considered, in first

²⁸*Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389 (S.D. Miss. 1969); *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969); *Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967). Compare these cases with the equal protection argument in *Palmer v. Thompson*, 403 U.S. 217 (1971). See also Note, *Palmer v. Thompson: A New Approach to Equal Protection?*, 43 Miss. L.J. 255 (1972).

²⁹309 F. Supp. 1127 (D.D.C. 1970) (federal tax benefits to racially segregated private schools disallowed). See also 68 COLUM. L. REV. 922 (1968).

³⁰*Board of Educ. v. Allen*, 392 U.S. 236 (1968).

³¹*Chance v. Mississippi State Textbook Rating and Purchasing Bd.*, 190 Miss. 453, 200 So. 706 (1941).

³²MISS. CODE ANN. §§ 6634, *et seq.* (1952). Compare the age of this enactment with the ages of the enactments struck down in the cases collected in note 28 *supra*.

³³340 F. Supp. 1003, 1011 (1972).

³⁴*Id.* at 1013.

³⁵*Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

amendment cases, indirect aid³⁶ and not entanglement³⁷ of government and religion as a separate standard. The fourteenth amendment standard urged would hold that when racial discrimination is involved, any state aid whatever, whether direct or indirect, is impermissible. Although the court refused to apply such a standard in this case,³⁸ this argument is not without precedent. In *Green v. Kennedy*³⁹ the court applied the strict standard of equal protection review to cases involving racial discrimination when it disallowed the tax exempt status⁴⁰ of racially discriminatory private schools in Mississippi. Churches, however, still retain their tax exempt status,⁴¹ thereby benefitting from the application of a less stringent standard to state aid to religion.

The salvation of the statutory authorization involved in the present case may be that it was enacted over thirty years ago and several years before the *Brown v. Board of Education* decision.⁴² This enactment, therefore, was free from racial motivation at its inception.⁴³ Its reasonable effect is not the support, maintenance, or establishment of racial discrimination in private schools.⁴⁴ The statute is the result of a racially neutral and benevolent policy,⁴⁵ and since all children are affected by the statute in the same manner, an equal protection argument may lose its validity. In view of the statute's neutral application to public and private schools, it may be argued that a child who elects to attend a private school should not be denied the benefits available under a public measure simply because he has made such a choice.⁴⁶ The textbook aid involved here is not the "substantial" aid to a private segregated school that has been struck down in previous cases.⁴⁷ In fact, it is doubtful that the

³⁶*Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbooks held to be indirect aid to private parochial school).

³⁷*Lemon v. Kurtzman*, 403 U.S. 602 (1971) (aid which benefitted private school excessively entangled government with religion).

³⁸340 F. Supp. 1003, 1011 (N.D. Miss. 1972).

³⁹309 F. Supp. 1127 (D.D.C. 1970).

⁴⁰*Id.* at 1127 n.1.

⁴¹*Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (held that granting of tax exemptions to religious organization did not violate the first amendment as this would be only minimal involvement between church and state).

⁴²347 U.S. 483 (1954).

⁴³*Norwood v. Harrison*, 340 F. Supp. 1003, 1007 (N.D. Miss. 1972).

⁴⁴*Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833, 845 (E.D. La. 1967) (Louisiana legislation tuition grants were found to establish and maintain a state supported system of racially discriminatory private schools, making the state a party to such discrimination); *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) (as in *Poindexter*, the legislation involved fostered the creation of private segregated schools).

⁴⁵Judge Wisdom stated in *Poindexter* that free lunch and textbook programs were the result of a "racially neutral benevolence." 275 F. Supp. at 835.

⁴⁶*See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (held that child may attend private school as opposed to public to satisfy state compulsory attendance law).

⁴⁷*See Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970) (tax exempt status to private segregated schools in Mississippi disallowed); *Coffey v. State Educ. Fin.*

cost of books (arguably a smaller cost than bus transportation or school tuition per pupil) would be borne by the schools in the absence of this statute. It was pointed out in *Allen*⁴⁸ that most private schools do not provide students with textbooks. Thus a financial benefit inures to the parent or child (*i.e.*, child benefit theory). The Supreme Court in

Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969) (Mississippi tuition grants); *Poindexter v. Louisiana Fin. Assistance Comm'n* 275 F. Supp. 833 (E.D. La. 1967) (Louisiana tuition grants). The court distinguished the above cases by noting the critical nature of financial support involved there as opposed to "the act of furnishing a state-owned textbook" here. 340 F. Supp. at 1012-13. It concluded that there was no showing in the instant case "that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools, now unitary." 340 F. Supp. at 1013.

Such a standard would appear to impose an extremely difficulty, if not impossible, burden of proof on the plaintiffs. Neither the tuition grant nor the tax exemption cases contained or required evidence that white students would return to public schools if only tuition grants or tax benefits were withdrawn. In fact, the significant increase in size and number of private academies since those decisions obviates such a conclusion. But the court, in applying the less-strict standard of state aid under the first amendment's establishment clause, imposed at the same time an even greater burden of proof than that required in previous cases under the more-strict standard of the fourteenth amendment's equal protection clause.

Had the court applied the "financial support" emphasis it found in the tuition grant cases, however, it might have been inclined toward a different result. *Coffey* found that almost all the private segregated academies were opened without any meaningful planning and on the "thinnest financial basis." 296 F. Supp. at 1389. Of the 107 academies receiving books, deposition evidence showed that no less than nineteen were opened in obsolete and abandoned public school buildings, twenty-six in church Sunday school facilities, and seven in private homes or buildings not constructed to house educational facilities. This situation, at the very least, presents a question of whether or not these schools met the "one pre-requisite" which, for private schools to participate in the textbook program, "must be satisfied for the student who attends a private school, *i.e.*, the school shall maintain educational standards equivalent to those established by the State Department of Education for Public Schools." 340 F. Supp. at 1013. As for the "financial support" which the court might have found in "the act of furnishing a state-owned textbook," stipulation and deposition evidence in the record indicated that during the 1970-71 school year the 107 academies receiving textbooks enrolled approximately 34,500 students and held 175,000 volumes costing the state of Mississippi approximately \$490,000. In addition, since the annual expenditure for new or replacement textbooks is approximately \$6.00 per pupil, the annual recurring state expenditure for students in segregated academies will be roughly \$207,000, exclusive of transportation and distribution costs. Including the forty-one private academies not receiving textbooks at the time of the decision, the total potential cost to the state, barring enrollment increases, would be \$610,000 in initial inventories and \$257,000 annually thereafter, again, exclusive of transportation and distribution costs. This potential cost to the state would average almost \$5,900 per academy in initial inventory and \$1,700 per academy in annual recurring expenditure.

⁴⁸392 U.S. 236, 244 n.6 (1968).

*Cochran v. Louisiana State Board of Education*⁴⁹ accurately described a statute analogous to that involved in the present case when it said:

The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. *Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.*⁵⁰

However, the "individual interests" and "common interest" mentioned above point out, as the district court did not, that one primary factor underlying the Supreme Court's "indirect aid" findings in establishment decisions is the recognition that parochial schools serve two functions: sectarian *and* secular.⁵¹ State aid was found constitutional in those decisions principally because its "neutral" purpose and effect was to aid the common interest or secular functions of those schools. Aid to the sectarian function was therefore only "indirect" and, in this light, not violative of the establishment clause. The "neutral purpose" factor thus recognized in the establishment cases and relied on by the district court here is intriguingly parallel to the early distinction in equal protection cases between integration and desegregation by which states were allowed to adopt a "neutral" posture in dismantling segregated school systems.⁵² That distinction, however, was subsequently overruled by the courts in the late sixties after the failure of "neutral" freedom of choice plans to effect unitary school systems:

The Court holds that Boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary system in which there are no Negro schools and no White schools — just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize.⁵³

Thus, in the fourteenth amendment context and in subsequent "affirmative duty" cases,⁵⁴ the test became not whether state aid is "di-

⁴⁹281 U.S. 370 (1930). Most of the opinion consists of quotes from *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655 (1929).

⁵⁰281 U.S. at 375 (emphasis added).

⁵¹*Lemon v. Kurtzman*, 403 U.S. 602, 663 (1971) (White, J., concurring).

⁵²*Cf. Briggs v. Elliot*, 132 F. Supp. 776, 777 (E.D.S.C. 1955): "The Constitution, in other words, does not require integration. It merely forbids discrimination."

⁵³*United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 389 (5th Cir. 1967).

⁵⁴*See Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972) (new school district may not be created where effect would be to impede dismantling of dual system); *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (statute tending to interfere with formulation of remedy for racial segregation held unconstitutional); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (reliance upon state's duty to form meaningful remedy for past policies and practices of segregation to uphold use of variety of techniques used to uproot an entrenched dual system);

rect" or "substantial," but that "any assist *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution."⁵⁵ Similarly, the measure of state legislation and policy in the field of education, particularly regarding school systems converting from dual to unitary operation, became the *effect* of the legislation and policy rather than its "neutral" purpose: "The existence of a permissible purpose cannot sustain an action that has an impermissible effect."⁵⁶ Moreover, this type of analysis in equal protection cases is in evidence as early as the decision in *Cooper v. Aaron*:⁵⁷

The constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . .

Green v. County School Bd., 391 U.S. 430 (1968) (freedom of choice struck down as state agencies charged with "affirmative" duty to take whatever steps necessary to convert to unitary system); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 869 *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967) (holding system-wide policy of integration as only adequate redress for previously overt system-wide policy of segregation). *Green v. Conally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971) and *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), *appeal dismissed, sub nom. Cannon v. Green*, 398 U.S. 956 (1970) (duty to affirmatively support public integrated education imposed on federal government). For underlying "affirmative duty" principle, see *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."); *Brown v. South Carolina Bd. of Educ.*, 296 F. Supp. 199 (D.S.C. 1968), *aff'd mem.*, 393 U.S. 222 (1968) (tuition grant legislation struck down); *Poindexter v. Louisiana Fin. Comm'n.*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd mem.*, 389 U.S. 571 (1968) (tuition grant legislation).

⁵⁵*Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178, 1181 (E.D. Va. 1969) (striking down tuition grant plan) (emphasis in original). Justice White, concurring in *Lemon v. Kurtzman*, 403 U.S. 602, 671 n.2 (1971), apparently made a similar distinction between first and fourteenth amendment cases. A number of other methods of state aid in which public school properties were transferred to aid private racially segregated schools have been similarly prohibited. *Wright v. City of Brighton*, 441 F.2d 447 (5th Cir.), *cert. denied, sub nom. Hoover Academy, Inc. v. Wright*, 404 U.S. 915 (1971); *United States v. Hinds County School Bd.*, 433 F.2d 598 (5th Cir. 1970); *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958). *Accord, Anderson v. Canton Municipal Separate School Dist. and Madison County School Dist.*, No. 28030 (5th Cir., Dec. 22, 1969) (rule to show cause why injunction should not issue); *United States v. Covington County School Dist.*, No. 28030 (5th Cir., Dec. 17, 1969) ("It is further ordered that the Lincoln Elementary school facility shall not be used, leased, or sold for private school purposes"); *Lemon v. Bossier Parish School Board*, Civil No. 10,687 (W.D. La., Sept. 25, 1970) (granting injunction against use of public schools athletic field for game between two private schools; field had been leased by Lions Club, sponsor of game).

⁵⁶*Wright v. Council of the City of Emporia*, 407 U.S. 451, 462 (1972). The court further held that in judging the "effect" of the state action at issue, the correct test is "whether it hinders or furthers the process of school desegregation." *Id.* at 460.

⁵⁷*Cooper v. Aaron*, 358 U.S. 1 (1958).

can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."⁵⁸

The district court's application of and reliance on first amendment cases in determining whether the provision of free, state-owned textbooks constitutes impermissible state aid to a private school thus precluded many, if not all, of the interesting questions which might have been reached had it applied the more stringent standard of the fourteenth amendment cases. One possible explanation for the court's reliance on establishment clause considerations might be that some of the private academies involved have names indicating church affiliation. Examination of the deposition evidence before the court, however, reveals that such schools are in fact affiliated in name only and therefore that the schools serve no strictly sectarian function, unless, of course, one such function is racial segregation. Since the instant decision relied so heavily on establishment cases, however, it seems unlikely, should the Supreme Court entertain equal protection arguments, that it will be allowed to stand.⁵⁹

Walker W. (Bill) Jones

CORPORATE INCOME TAXATION — CORPORATION CANNOT DEDUCT LOSSES
ON PROPERTY HELD FOR NON-CORPORATE PURPOSES UNDER
SECTION 165 (a) IRC

In 1944 petitioner, a corporation, acquired a piece of lakefront property which was to be held for the personal use of its stockholders.¹ The property was sold at a loss in 1957.² Petitioner claimed the right to use the loss incurred on the sale of the property as a capital loss carryover³

⁵⁸*Id.* at 17.

⁵⁹*Norwood v. Harrison*, 340 F. Supp. 1003, *review granted*, 41 U.S.L.W. 3166 (U.S. Oct. 10, 1972) (No. 72-77). In any event, there is a need for definite guidelines by which state aid to private non-sectarian schools can be measured. If textbooks are not permissible aid, then where is the line to be drawn? For example, is state aid to such schools in the form of police and fire protection also impermissible?

¹Petitioner acquired for \$23,875.36 a 13-acre tract of land on Beaver Lake, Waukesha County, Wisconsin. During the period of September, 1944, through August, 1949, petitioner expended a total of \$409,863.29 for the construction of buildings, for the acquisition of furniture, fixtures, and equipment, and for various other improvements to the lakefront property. Additional improvements were made during fiscal years ending August 31, 1950, through August 31, 1952, at a cost of \$47,611.98. Petitioner received gross rental income in respect to the property from four stockholders and four affiliate companies totaling \$28,850 for the period of 1948 through September, 1950.

²Petitioner had attempted to sell the lakefront property in 1950 and in 1951 at a price of \$200,000. The property was eventually sold at public auction in June, 1957, at which time petitioner's adjusted basis was \$447,167.16. A total of \$144,500 was realized on the sale, thereby producing a loss of \$302,667.16.

³*See* INT. REV. CODE of 1954, § 1212 (pertaining to capital loss carryovers).

for subsequent years. The Commissioner disallowed the carryovers on the ground that a deduction for the loss on the sale of property which is not held for use in a trade or business or for the production of income is prohibited by section 165(a)⁴ of the Internal Revenue Code. Petitioner contended that section 165(a) by its own terms allows a deduction of any loss incurred by a corporation.⁵ On petition to the Tax Court of the United States, *held*, judgement for respondent. Deduction by a corporation of a loss suffered on the sale of nonbusiness assets is prohibited by section 165(a) of the IRC, and no capital loss carryover may be had with respect thereto. *International Trading Co. v. Commissioner*, 57 T.C. No. 46 (Dec. 28, 1971).

Provisions for corporate loss deductions have long been inherent in Federal tax law.⁶ In 1909 Congress imposed upon corporations an excise tax measured by net income for the privilege of doing business.⁷ In computing net income the act allowed a deduction for "all losses actually sustained within the year and not compensated for by insurance or otherwise."⁸ Congress, in 1913, abandoned the excise tax on the privilege of doing business and imposed a tax directly on net income.⁹ The provisions of the 1913 Act relating to the deduction of losses by corporations¹⁰ were identical to the provisions of the 1909 Act and remained essentially unchanged through the Internal Revenue Code of 1939.¹¹ Although the Internal Revenue Code of 1954 combined into section 165 all of the 1939 Code provisions dealing with losses, no substantive change was effected by this rearrangement.¹² Several commentators have viewed the absence of limitations on the deductibility of corporate losses under section 165(a) as a presumption that all transactions entered into by a corporation are either for profit or in connection with a trade or business.¹³ "A corpora-

⁴INT. REV. CODE of 1954, § 165 (a): "General Rule—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise."

⁵Petitioner compared the language of section 165 (a) with section 165 (c), which limits the loss deduction of individuals to losses incurred in trade or business, or in transactions entered into for profit, or to losses arising from casualty. Petitioner argues that the language of section 165 (a) is clearly stated and places no limitations on corporate losses as does section 165 (c) upon individual losses.

⁶Act of August 27, 1894, ch. 349, § 32, 28 Stat. 556, imposed a two percent tax on the net profits of income above actual operating and business expenses, including losses. The Act was declared unconstitutional in *Pollock v. Farmers Loan & Trust Co.*, 158 U.S. 601 (1895).

⁷Act of August 5, 1909, ch. 6, § 38, 36 Stat. 112.

⁸*Id.* at 113.

⁹Act of October 3, 1913, ch. 16, 38 Stat. 166.

¹⁰*Id.* at 167 (allows a deduction for "losses actually sustained during the year, incurred in trade. . . and not compensated for by insurance or otherwise").

¹¹Int. Rev. Code of 1939, ch. 1, § 23 (f), 53 Stat. 13 (now INT. REV. CODE of 1954, § 165 (a)).

¹²S. REP. No. 1622, 83d Cong., 2d Sess. 198 (1954).

¹³*See, e.g.*, B. BITTKER & J. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 5.03 (3d ed. 1971); J. CHOMMIE, *FEDERAL INCOME TAXATION* 109 (1968); A. PARKER, *DEDUCTIONS AND CREDITS* 76 (rev. ed. 1967).

tion is normally deemed to be engaged in a 'trade or business'; however, to the extent that it is operated solely for the pleasure or recreation of its stockholders, it is not engaged in a 'trade or business.'"¹⁴ On several occasions, attempts by corporate taxpayers to secure deductions under section 162¹⁵ and section 167¹⁶ were thwarted because the property in question was not held for business purposes, but was held for the personal use of the corporations' shareholders.¹⁷ It was soon discovered that the broad judicial¹⁸ and administrative interpretation given to the term "ordinary and necessary" resulted in expenditures related to entertainment activities and facilities being allowed as deductions where their connection with a trade or business was quite remote. Expenditures relating to entertainment facilities met the "ordinary and necessary" test of sections 162 and 212,¹⁹ when in reality the expenditures were ordinary and necessary only to the extent that they developed goodwill for the

¹⁴International Trading Co. v. Commissioner, 275 F.2d 578, 584 (7th Cir. 1960).

¹⁵INT. REV. CODE of 1954, § 162 (a): "In General—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

¹⁶INT. REV. CODE of 1954, § 167 (a): "General Rule—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) —

- (1) of property used in the trade or business, or
- (2) of property held for the production of income."

¹⁷International Trading Co. v. Commissioner, 275 F.2d 578 (7th Cir. 1960). In 1951, 1952, and 1953 the petitioner in the principal case sought to deduct the maintenance expenses and depreciation on the Beaver Lake property because the corporation had purchased and maintained the property as an investment and for the purpose of entertaining its customers and suppliers in connection with its brewery supply business. In disallowing the deductions, the Court of Appeals stated:

Even though the evidence shows that the taxpayer had rental income from its commercial properties in Milwaukee, and to that extent was engaged in carrying on a rental business for profit, nevertheless, as respects the Beaver Lake property, the expense of maintaining it, in view of the evidence, cannot be said to be an "ordinary" and "necessary" expense within the meaning of section 23 (a) (1) (A) [now § 162 IRC of 1954].

See also Greenspoon v. Commissioner, 229 F.2d 947 (8th Cir. 1956), where expense of maintaining sole shareholders farm as horticultural showplace was not an ordinary and necessary business expense of industrial pipe corporation, though place was used incidentally to entertain prospective customers; Black Dome Corp., 5 CCH Tax Ct. Mem. 455 (1946); Savarona Ship Corp., 1 CCH Tax Ct. Mem. 89 (1942).

¹⁸See, e.g., Sanitary Farms Dairy, 25 T.C. 463 (1955), where the cost to a dairy of sending two of its principal officers to Africa on a big game hunt was held to be an ordinary and necessary expense of the petitioner's business.

¹⁹INT. REV. CODE of 1954, § 212: "In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year —

- (1) for the production or collection of income;
- (2) for the management, conservation, or maintenance of property held for the production of income."

business.²⁰ With the enactment of section 274 IRC²¹ in 1962, Congress imposed substantial limitations on the availability of deductions related to entertainment expenses and facilities which otherwise qualified under sections 162 and 212.²² Under section 274(a)(1)(B) a taxpayer is not allowed a deduction with respect to an entertainment or recreational facility unless the facility is used primarily for the furtherance of the taxpayer's trade or business and the expenditure was directly related to the active conduct of such trade or business. Expenses related to an entertainment or recreational facility include depreciation, operating costs, and *losses realized on the sale or other disposition of the facility*.²³

In disallowing the deduction in the instant case, the court examined the legislative history of section 165(a) and concluded that Congress assumed that losses by corporations would arise out of its trade of business. The court reasoned that since such an assumption cannot be made with respect to losses suffered by an individual, the limitations set forth in section 165(c) are necessary and their absence from section 165(a) is appropriate. Using an integrated approach to the Code, the court refused to adhere to a literal reading of the statute and cited *United States v. Kirby*²⁴ to support the proposition that the reason of the law should prevail over its letter. The court noted that the Supreme Court had applied this rule of statutory construction to a revenue act in *Helvering v. Owens*.²⁵ There the taxpayer's casualty loss on his personal automobile was limited to the difference between its cost reduced by depreciation, which in fact had not been allowed by reason of the personal use of the automobile, and the value after the accident. The Court recognized this limitation despite the fact that a literal reading of the statute seemed to allow a loss in the amount of the difference between the cost and value after the casualty. Although section 274 was not specifically applicable to the years in question, its legislative history provided insight to the court in determining whether section 165(a) allowed a deduction of a loss suffered on the sale of nonbusiness assets. The court noted that Congress was quite explicit in detailing that losses incurred on the sale of entertainment-type facilities would not be deductible.²⁶ Particular emphasis was placed on the fact that the taxpayer had previously been denied a depreciation deduction on the property in question because it

²⁰See CHOMMIE, *supra* note 13, at 109.

²¹INT. REV. CODE of 1954, § 274.

²²Expenses related to entertainment activities and facilities must meet two tests in order to be deductible. First, there is the "ordinary and necessary" test of sections 162 and 212. Secondly, the expenses must meet the "directly related to business" test of section 274.

²³See Treas. Reg. § 1.274-2(e)(3)(i) (1963).

²⁴74 U.S. (7 Wall.) 482 (1868). "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *Id.* at 486.

²⁵305 U.S. 468 (1939).

²⁶See S. REP. No. 1881, 87th Cong., 2d Sess. 31 (1962). The substance of this report has been embodied in the Treasury Regulations interpreting § 274. See Treas. Reg. § 1.274-2(e)(3)(i) (1963).

was neither business nor income-producing property.²⁷ Thus the court concluded that the allowance of a loss deduction on the sale would in effect give the taxpayer the benefit of a substantial portion of the depreciation which had previously been disallowed as a deduction.

Six judges dissented on the ground that the language of section 165(a) is clear and places no limitations on the deduction of losses by corporations. Judge Tannenwald, in his dissenting opinion, believed that an adoption of the "held for use in trade or business" test would produce a myriad of problems in that the test does not mean that the property actually must be so used.²⁸ Furthermore, he noted that the corporation would be in a worse position than the individual shareholders had they owned the property directly.²⁹ The dissenting opinion of Judge Drennen took issue with the majority opinion on the ground that its conclusion represented an exercise of authority far beyond that of any court. He reasoned that it could hardly be argued that Congress, in rearranging the loss provisions in 1954, was not aware of the effect of placing limitations on individual losses only.

The divergence of the two views expressed by the court concerning its responsibility in construing a statute is one of emphasis. Proponents of the majority's view argue that the courts have a responsibility to carry out the purpose of the legislation even if it means going beyond the literal meaning of the words of the statute. To do otherwise is to burden Congress with the necessity of considering additional details of the law. The cases are numerous in which the courts have refused to adopt a literal approach in construing a statute to avoid a defeat of Congressional purpose.³⁰ Opponents of this view support strict adherence to the ordinary meaning of the statute and argue that the courts do not have the authority to go beyond the literal meaning of the statute when the language is clear. The court in the instant case interpreted *Helvering v. Owens* as a master key to the doors of judicial legislation. If the dicta of *Owens* were logically applied to the instant case, one would be compelled to allow the taxpayer a deduction for the loss, but limited to the difference between the proceeds of the sale and the original cost less depreciation.³¹ It is apparent that the courts must be vested with author-

²⁷INT. REV. CODE of 1954, § 167.

²⁸*Compare* Alamo Broadcasting Co., 15 T.C. 534 (1950), *with* Nulex, Inc., 30 T.C. 769 (1958), [and] Rev. Rul. 56-520, 1956-2 CUM. BULL. 170.

²⁹If the Beaver Lake property had been destroyed by fire or other casualty, the absolute rule dictated by the majority opinion would deny any loss to a corporation. On the other hand, such loss would clearly be deductible by an individual under section 165(c). Judge Tannenwald further stated that *Helvering v. Owens*, 305 U.S. 468 (1939), did not demand that the court rewrite section 165(a). He interpreted *Owens* as standing for the proposition that the measure of a loss is to be geared to economic realities and noted that the case might be applied in the instant case to limit the loss to the difference between the proceeds of the sale and the original cost less nondeductible depreciation.

³⁰*See, e.g.,* Corn Products Co. v. Commissioner, 350 U.S. 46 (1955), wherein the Court held that income realized from transactions of commodity futures would be treated as ordinary income rather than capital gains.

ity to give effect to the intentions of Congress when construing a statute. Nevertheless, the exercise of that authority should not open the door to Pandora's box and create a multiplicity of additional problems. The test promulgated by the majority court results in the creation of a nebulous standard by which an explicit statute will be interpreted.³² It cannot reasonably be argued that Congress intended the result of the instant case when it placed limitations in section 165(c) only. A legislature acts by legislating, not by remaining silent. The decision of the court in the instant case disregards the fundamental principle that legislation is not the function of the judiciary but of Congress. If limitations are to be placed upon corporate losses, it is for Congress to specify them.

Ellis Glenn Koury

³¹In *Nulex, Inc.*, 30 T.C. 769 (1958), the court reached a similar result. A taxpayer was allowed to deduct the difference between the selling price of a non-business asset and the cost less depreciation, which had been disallowed due to the nonbusiness nature of the property.

³²The application of the "held for use in trade or business" test in prior cases has yielded varying results. See *Nulex, Inc.*, 30 T.C. 769 (1958). In 1946 when the taxpayer was dormant in the oil and gas business, it purchased a boat for the purpose of entering into the commercial chartering business. When taxpayer could not secure a license for the boat, it sold it at a loss. The court held that the boat was not property used in a trade or business and disallowed a depreciation deduction.

In *Alamo Broadcasting Co.*, 15 T.C. 534 (1950), the taxpayer radio station purchased high-powered transmitting equipment from a Mexican radio station. When taxpayer failed to secure permission to remove the equipment from Mexico, it sold the equipment at a loss. In holding that the property was used in trade or business, the court stated: "We have previously held that 'used in the trade or business' means 'devoted to the trade or business' and includes property purchased with a view to its future use in the business even though this purpose is later thwarted by circumstances beyond the taxpayer's control." *Id.* at 541.

See *Carter-Colton Cigar Co.*, 9 T.C. 219 (1947), where the taxpayer, a wholesale distributor of tobacco products, purchased unimproved real estate with the intention of erecting a business building thereon to be occupied by it. The original purpose was later abandoned, and the property was sold at the first opportunity. The court held that the property was used in trade or business and stated: "The acquisition of real estate for use at its principal place of business by a corporation is a proper business purpose and function, and the real estate so purchased, in our opinion, is devoted to and 'used in' the business of the corporation during the planning and building stages preparatory to actual occupancy." *Id.* at 221. *But cf.* Rev. Rul. 56-520, 1956-2 CUM-BULL. 170, where the taxpayer, a radio broadcasting corporation, made expenditures during the course of a contest before the FCC to determine whether it should be awarded permission to use a certain channel in connection with its proposal to operate a television station. The ruling held that (1) the amounts expended were not deductible from gross income; (2) since the useful life of the asset was of an undeterminable duration, no deduction was allowed for depreciation; and (3) the cost basis is recoverable upon its sale or other disposition.

See also *Kittredge v. Commissioner*, 88 F.2d 632 (2d Cir. 1937); *Yellow Cab Co. v. Driscoll*, 24 F. Supp. 993 (W.D. Pa. 1938); *Wilson Line, Inc.*, 8 T.C. 394 (1947); *P. Dougherty Co.*, 5 T.C. 791 (1945).

PRIVATE CLUBS — STATE REGULATION AND STATE ACTION

Appellee, a Negro, brought this action seeking an injunction revoking the liquor license issued Moose Lodge No. 107, a private club,¹ by the Pennsylvania Liquor Control Board.² In keeping with its policies of racial discrimination, Moose Lodge No. 107 refused service of food and beverage to the appellee.³ Appellee claimed this discrimination was violative of 42 U.S.C. § 1983,⁴ and requested injunctive relief. A three-judge district court was convened,⁵ and granted the appellee's requested relief.⁶ On direct appeal⁷ to the United States Supreme Court, *held*, reversed and remanded. Where a state regulatory scheme is neutral in its effect on acts of discrimination by a private club, racial discrimination by that club is private and does not involve the state sufficiently to constitute "state action" subject to the equal protection clause of the fourteenth amendment. *Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965 (1972).

Discrimination results from either private action or state action. The Supreme Court has held that the fourteenth amendment proscriptions against racial discrimination apply only to discrimination commit-

¹The Court offered several reasons for the classification of Moose Lodge No. 107 as a private club. These include the following: (1) it is a local chapter of a national fraternal organization with well-defined requirements for membership; (2) it owns its own building; (3) it is not publicly funded; (4) only members and guests are permitted in the lodge; and (5) guests must be invited by a member or by the house committee. The Court noted also that the Lodge is located on land owned by it; it is not open to the public; and it is not located in such a position that it performs a function that would otherwise be performed by the state. *Moose Lodge No. 107 v. Irvis*, 92 S. Ct. 1965 at 1970, 1972 (1972).

²The license had been issued in compliance with state laws and regulations, which require that "every club licensee shall adhere to all the provisions of its constitution and by-laws." 92 S. Ct. at 1973, *citing* Reg. of Pa. Liquor Control Bd. § 113.09 (June, 1970 ed.).

³Section 92.1 of the General Laws of the Loyal Order of the Moose states that only persons qualified for membership may be guests. 92 S. Ct. at 1974. To be qualified for membership, a person must be a Caucasian. *Id.* at 1968.

⁴42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

⁵28 U.S.C. § 2881 (1970) requires the convening of a three-judge district court in order to restrain enforcement of a state law or administrative regulation.

⁶*Irvis v. Scott*, 318 F. Supp. 1246 (M.D. Pa. 1970).

⁷28 U.S.C. § 1254 (1970) provides for direct appeal to the Supreme Court from a three-judge district court.

ted by the state and not to discrimination committed by private citizens.⁸ The Court in the *Civil Rights Cases*,⁹ said Congressional power to prohibit racial discrimination¹⁰ could only be used to enforce prohibitions against "state action of a particular character."¹¹ The issue of "state action" has traditionally been presented in actions brought under post-Civil War legislation or under their more modern counterparts.¹² In the ensuing line of cases involving the "state action" question, the Court has found "state action" to be present in many diverse methods of discrimination.¹³ In a concurring opinion in one of these cases,¹⁴ Justice Douglas, in considering the scope of *Shelley v. Kraemer*,¹⁵ said that "leaving the zoning function to groups which practice discrimination and are licensed by the states constitutes state action in the narrowest sense in which *Shelley v. Kraemer* can be construed."¹⁶ Justice Douglas further indicated that any business that is regulated and licensed by the state should be nondiscriminating.¹⁷ The urgency of the "state action" issue has been diminished by the proscriptions of the Civil Rights Act of 1964 which are applicable to discrimination in places of public accommodation as well as to discrimination under color of state law.¹⁸ Moreover, because of the facts and circumstances of allegedly private discrimination, it is easier to find "public accommodation" rather than "state action." Since private clubs are excepted from the provisions of Title II of the Civil Rights Act,¹⁹ discrimination by these clubs is not unlawful unless "state action" is involved.

⁸See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882); *United States v. Cruikshank*, 92 U.S. 542 (1875). But see *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) (a thirteenth amendment case).

⁹109 U.S. at 11.

¹⁰The Court was speaking of the Civil Rights Act of 1875, 18 Stat. 335 (1875).

¹¹109 U.S. at 11.

¹²42 U.S.C. § 1983 (1970) was derived from section 1 of the Civil Rights Act of 1971, Rev. Stat. § 1979 (1875).

¹³Since the scope of this note is limited to "state action" in discrimination by private clubs, a discussion of the cases otherwise developing the "state action" concept would be overbroad. For a discussion of these cases, see G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW*, ch. 6, § 2 (8th ed. 1970); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L. J. 1353 (1964); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Comment, *Civil Rights—State Action Not Required Under Sections 1981, 1982, and 1983 (3) of Title 42; Action "Under Color of State Constitutional Right" Satisfies the "Color of Law" Requirement of Section 1983*, 23 VAND. L. REV. 413 (1970).

¹⁴387 U.S. 369 (1967) (discrimination in housing).

¹⁵334 U.S. 9 (1948) (enforcement of restrictive covenant was "state action").

¹⁶387 U.S. at 384-85.

¹⁷*Id.* at 386.

¹⁸See 42 U.S.C. § 2000a (a) (1970). In cases where discrimination was in a place of public accommodation, there need be no "state action"; suit can be brought under this act rather than 42 U.S.C. § 1983 (1970).

¹⁹42 U.S.C. § 2000a (e) (1970).

In the instant case, the Court approved of the difference in the effect of private and state discrimination established by its decision in the *Civil Rights Cases*,²⁰ and further noted that *Shelly v. Kraemer*²¹ made unlawful a state's enforcement of discrimination originating from private sources. The Court then reiterated its holding in *Reitman v. Mulkey*²² that where the impetus for discrimination is private, the state's involvement in that discrimination must be significant for it to be unconstitutional. The Court found that with the exception of the state's requirement of the lodge's compliance with its by-laws,²³ the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board had nothing to do with the establishment or enforcement of the appellant's discriminatory guest policies. The Court then concluded that the board's licensing of the club did not amount to "state action", and therefore, the club's discrimination was private and not violative of the fourteenth amendment.²⁴

The Court's decision in *Moose Lodge* is significant in several respects. The decision establishes that discrimination by a private club is not forbidden by the fourteenth amendment merely because the club is associated with a state regulatory agency. Although far-reaching implications were initially envisioned when *Moose Lodge* was decided, the practical effect of the case will be limited since an ostensibly private club practicing racial discrimination will find it difficult to be classified as "private" under the 1964 Civil Rights Act and thus escape the proscriptions of that Act²⁵ or similar state statutes.²⁶ The more significant aspect of the Court's decision is its refusal to find "state action" when faced, apparently for the first time, with the task of measuring state action against the neutral involvement of a state in a private club's acts of racial discrimination. Had the Court determined

²⁰109 U.S. 3 (1883) (private discrimination is not forbidden by fourteenth amendment).

²¹334 U.S. 1 (1948).

²²387 U.S. 369 (1967).

²³The Court did enjoin the enforcement of section 113.09. If enforced, however, that section would have required the Moose Lodge to adhere to its racially discriminatory by-laws. See note 3 *supra*.

²⁴Dissenting opinions were filed by Justices Douglas and Brennan with Justice Marshall joining in each. Justice Douglas maintained that a relative scarcity of liquor licenses for blacks, as a result of the state enforced regulatory scheme, created "state action." Justice Brennan claimed that the state regulation of liquor made it so related to the lodge that "state action" resulted. 92 S. Ct. at 1976, 1978.

²⁵See, e.g., *Daniel v. Paul*, 395 U.S. 298 (1969), in which an allegedly private recreation facility was deemed to be a "public accommodation" within the meaning of the 1964 Act, because it offered to serve interstate travelers, a substantial portion of the food served there had moved in interstate commerce, and the Club was a place of entertainment whose operations affected commerce.

²⁶After the decision in the instant case, the Pennsylvania Supreme Court found that Moose Lodge No. 107 was a place of "public accommodation" within the meaning of the state's Human Relations Act. *Pennsylvania Human Relations Comm'n v. Moose Lodge No. 107*, 41 U.S.L.W. 2079 (Pa. July 31, 1972).

that discrimination under these circumstances was unlawful, the lines between state and private discrimination would have been obliterated. Since nearly everyone is, in some way, affected or regulated by the state, virtually all acts of discrimination could be considered unlawful. For example, a person engaged in acts of discrimination would surely be doing so as a home owner, property owner, automobile operator, or in some other capacity which is neutrally regulated by the state. Thus *Moose Lodge* should not be regarded as a withdrawal by the court from established concepts of state action but as an appropriate refusal to extend the state action doctrine beyond its logical, practical limits and into the realm of true private action.

Robert H. Walker

BOOK REVIEW

MARIHUANA: A SIGNAL OF MISUNDERSTANDING

First Report of the National Commission on Marihuana and Drug Abuse. Washington, D.C., U.S. Government Printing Office, 1972. Pp. x + 184. \$1.00 (paper cover).

During the past decade the use of marihuana by the youth of this nation has created a major national problem. As a result, President Nixon in conjunction with Congress appointed a special commission to study marihuana in all of its contexts and report upon the findings. What resulted was a thorough, yet non-technical study focused on the American experience. In achieving this end, it is quite evident from reading the report that the Commission utilized an independent, non-partisan approach in evaluating the polemics surrounding marihuana. The mere fact that such a study was sanctioned reflects a sincere desire on the part of the federal government to learn the truth about marihuana rather than basing their views on mere conjecture.

The Commission, in order to structure its report in the most logical and cogent manner, divided the text into five major sections: I. Marihuana and the Problem of Marihuana; II. Marihuana Use and Its Effects; III. Social Impact of Marihuana Use; IV. Social Response to Marihuana Use; and V. Marihuana and Social Policy. This review will discuss and evaluate each of these major topics.

I. Marihuana and the Problem of Marihuana

Since the mid-sixties the so-called marihuana problem has continuously acted to agitate and polarize large segments of American society and is now viewed by many as a major national problem. This conclusion, the Commission believes, stems from three interrelated factors. First, the illegal use of marihuana is visible to the general populace. This exposure may be credited to the mass media. As a direct result, society has been confronted with visible evidence, valid or otherwise, of widespread use of the drug by a segment of our population which never before had used marihuana. Consequently, the resulting anxiety, coupled with misinformation and ignorance concerning marihuana, has helped foster the "problem." Secondly, society has come to view marihuana as a threat to the health and morals of not only its users but also society itself. Idleness, lack of motivation, and sexual promiscuity are just a few of the immoral and antisocial behaviors linked with the use of the drug. In fact, many believe that marihuana is the impetus of a counterculture aimed at the rejection, if not the destruction, of society's cherished values. Thirdly, and most importantly, the use of marihuana has come to symbolize wider conflicts and public issues. This is particularly true of the current youth movement and its disaffection with traditional society.

In an effort to reach a better understanding of the marihuana problem, the Commission sought to place the drug's use in the proper

historical and cultural perspectives. Historically, marihuana has been used throughout the world for centuries, but only within the last seventy-five years has its use emerged in the United States. Paralleling the introduction of marihuana into the United States was the surfacing of the previously overlooked problem of narcotic addiction. At that time narcotic addiction was almost nonexistent. Nevertheless, because little was known about marihuana, it was considered to be a narcotic. Society responded to this so-called "narcotic problem" by the enactment of stringent criminal legislation. During this same period emerged a concomitant clamor for the prohibition of alcohol and tobacco. Consequently, certain comparisons must be drawn. Consumption of alcohol and use of tobacco, unlike the use of marihuana, are indigenous American practices. Furthermore, while the temperance movement was marked by vigorous public debate resulting in legislation aimed toward eradicating definite problems stemming from alcohol abuse, the anti-narcotic legislation resulted from a strong undercurrent whose expected end was largely anticipatory. The evolution of these movements has resulted in alcohol and tobacco use becoming one of personal choice while the use of marihuana is still criminally prohibited. The disparity here, as pointed out by the Commission, is further emphasized by the fact that over nine million persons suffer from alcoholism, and one-half of all highway deaths, homicides, and arrests in general are related to alcohol misuse. Similarly tobacco smoking has been directly linked to lung cancer and heart disease.

The Commission points out that a possible cultural reason behind the increase in marihuana use has been the rapid technological changes that have occurred in our society. The rationale of this statement is based on the educated assumption that automation has acted to strip man of a part of his identity and at the same time provided him with more leisure time to search for individual fulfillment. At the same time the mobility of modern society has acted to destroy an individual's sense of community. All of these social trends have had their strongest influence on young people. Young people having grown up during this period of rapid change have known no other experience except excessive leisure stemming from affluence. The use of marihuana, like alcohol and tobacco use, is merely a method of leisure enjoyment. The Commission concludes in part that although society has the right to interfere with individual conduct if such conduct is detrimental to society, this interference should not be wantonly used but rather should be relegated to the careful scrutiny of the complicated question of the social impact of private behavior.

II. Marihuana Use and Its Effects

The Commission found that the use of marihuana has permeated all segments of the American population. Use was found to be prevalent in every strata of society, though more predominant among persons with above average intelligence and incomes. The incidence of use was found to be greatest among young people. Furthermore, usage was highest in areas of dense population, while little usage was noted in rural areas.

The Commission categorized the marihuana user based on frequency of use. It was emphasized, however, that the traits delineated per category were not necessarily exclusive to marihuana users. The first and largest category was designated by the Commission as "experimental users." These users are practically indistinguishable from the non-user. This group uses marihuana once a month or less. The second group, termed "intermittent users," uses the drug irregularly, normally at least once a month but less than several times a week, for its social and recreational purposes. These users tend to use the drug as a sort of social group ritual. Like non-users, they are likely to be intellectually and culturally oriented, self-expressive, creative, and flexible. The final groups of users are the "moderate and heavy users." The "moderate users" tend to share traits with both the "intermittent and heavy users." The "heavy users" use the drug for its personal rather than its social effects.

In almost all instances the Commission found that the "intermittent and moderate users" are virtually indistinguishable from the non-users except for the marihuana use. A person's biological characteristics and personality in conjunction with his cultural and social setting are recognized as playing an important part in determining if an individual will use marihuana. The Commission found a direct relationship between an individual's use of marihuana and the life style of his parents. In fact, the marihuana user frequently has parents who use alcohol and tobacco. Furthermore, marihuana users have been found, in most instances, to be users of alcohol and tobacco as well.

Another major factor in the usage of marihuana is the social influence exerted by one's peer group. Having friends who use marihuana provides the curious with the opportunity to experiment. Social peer groups are most influential upon young people. A group-accented activity provides the shy, lonely, and insecure individual with a key to group acceptance. Because of boredom with the effect, legal hazards, fear of health hazards or social pressures, "experimental and intermittent users" often discontinue use.

As to the claim that marihuana use leads to the use of harder drugs, the Commission found that only a small percentage of marihuana users who experiment with other drugs become persistent, frequent users. Rather, the use of other drugs depends on the individual, his social and cultural setting for such drug taking, and on the nature of the drug market. However, there is no proof that such drug taking is inevitable or necessary.

The actual effect of marihuana depends upon several variable factors. These include such things as dosage, method of use, the metabolism of the user, the setting, and tolerance. The effect itself on the user's state of mind includes the alteration of emotions, feelings, sensibility, consciousness, and thinking.

The Commission identified immediate effects as those occurring during drug intoxication or shortly thereafter. The effect during intoxication is, in most cases, analogous to daydreaming. In addition, the user experiences a feeling of well being, restlessness, hilarity, hunger,

partial loss of memory, and alteration of sensory perceptions. Nevertheless, such changes are not perceivable to an unknowing observer. As the dosage increases, the more intensified are the reactions. Based on medical evidence the Commission concluded that there was little proven danger of physical or psychological harm from experimental or intermittent use of marihuana. Nor was any psychological dependence on the drug observed by such users. However, slight psychological dependency was observed in "moderate users," yet such dependency was proven to be no greater than that experienced by alcohol users. In many instances the degree of dependency was shown to be less.

III. Social Impact of Marihuana Use

The greatest amount of fear and corresponding rhetoric concerning marihuana has centered on the popular belief that marihuana use is harmful to society in general. This harm refers to the blind belief that marihuana use is linked to crime, anti-social behavior, and parasitic social dependency. These unsubstantiated beliefs have resulted in the creation of the stereotyped marihuana user—*i.e.*, an irresponsible, mentally ill, criminally inclined individual with aggressive tendencies. In most instances marihuana has been linked to such behavioral traits merely because such an individual was found to be in possession of marihuana. However, no proof has established a positive and direct relationship between marihuana use and anti-social conduct, be it criminal or delinquent. Rather, as the Commission points out, many variables must be taken into consideration to establish such a relationship. In fact, based on current professional opinion and empirical data, no relationship has been found to exist between the use of marihuana and the commission of violent or non-violent crimes. Rather marihuana has been found in most cases to pacify a person's aggressive, anti-social tendencies. Those users who commit crimes do so, not because of marihuana use, but because of definite social, economical, and environmental factors. Indeed, the bulk of evidence shows that a large majority of crimes are committed by persons under the influence of alcohol. Consequently, within this framework, neither the user nor the drug can be said to constitute a danger to public safety. In an attempt to dispel many of society's unfounded fears about marihuana, the Commission explains that marihuana use is not lethal, does not cause genetic damage, and causes no physical damage or abnormalities such as tobacco and alcohol use does. Less than chronic, heavy use causes minimal motivation losses and no greater psychological dependence than tobacco smoking. Based on these facts, the Commission concludes that marihuana use at the present level in no way constitutes a threat to public health.

Marihuana is identified today primarily with young people because they constitute the greatest percentage of users and because of the openness in which they use the drug. Society identifies bohemian appearance, counter-culture activity, and rejection or "dropping out" of contemporary society with drug usage. However, it is highly unlikely that the introduction of a single element, such as marihuana, could change the basic personality and character structure of an individual

to any degree. Rather, the Commission suggests, the tendency to drop out is generated from multiple factors causing pressures on the individual with which he is incapable of coping. Nor does marihuana use go hand in hand with radical politics. The exponents of radical politics have cunningly espoused and manipulated marihuana use in an attempt to achieve their political ends. Consequently, the emergence of radical politics has been cleverly used to cloud and blight the marihuana issue. Marihuana usage, viewed in the context of the profound changes that have occurred in recent years in the areas of economics, civil rights, politics, family life, religion, recreation, and employment, is considered by the Commission as being more of a consequence rather than an impetus of these changes. It is unlikely that marihuana will affect the future stability, strength, or vitality of our social and political institutions.

IV. Social Response to Marihuana Use

Since the use of marihuana first surfaced in this country, society has been divided as to the most appropriate method of controlling its use. As the survey conducted by the Commission reveals, approximately one-quarter of the American public is in favor of removing criminal sanctions, another one-quarter is convinced that the current social and legal policies should be maintained and the remaining one-half of the citizenry is confused or ambivalent as to what should be done. The Commission sought in its study to determine alternate social and legal policies that would best meet the needs of society as a whole. As noted previously, the initial social response to marihuana use was tailored to the narcotic policy adopted by the federal government—*i.e.*, that marihuana was a dangerous habit forming narcotic that should be stringently regulated by strict criminal laws. As a result, all states in one manner or another adopted criminal laws making marihuana use and possession a crime. However, with the rapid increase of use during the mid-sixties by middle and upper class college youth, a reevaluation of existing social and legal policies was needed. The impetus behind this mood stemmed from the fact that persons with no previous criminal records from solid family and educational backgrounds were being arrested and incarcerated for the mere possession or use of marihuana. Also, marihuana was of a totally different nature than the narcotics with which it was classified. With the increase in arrests and convictions, a paralleling decline in the number of incarcerations and the average length of sentences was noted. In further response, the federal government and approximately 75 percent of the states have reduced possession of marihuana to a misdemeanor, with first offenders usually given some form of probation. On the federal level, little or no effort is made to seek out possessors of marihuana, and the cases of those arrested for possession or casual transfer are normally dismissed or turned over to the appropriate state for prosecution. On the state level, a similar policy of not seeking out private marihuana use is followed and arrest resulting from violation of marihuana possession laws occur only when the possession is found to be open and notorious. When these arrests occur, the Commission noted that the offenders were generally arrested in

groups. In fact the Commission found that 31 percent of the prosecutors surveyed stated they would not prosecute anyone arrested using marihuana at a private social gathering. Furthermore, many officials of the criminal justice system were shown to be disenchanted with the present criminal controls and thus less insistent on any method of formal control. Many non-legal institutions such as the family, schools, and the medical community also expressed a desire for more lenient controls. Uncertainty as to what should be the proper controls is the common denominator of all concerned. Regardless of this uncertainty the startling fact is that young people, who are not criminals in any form or fashion, are being incarcerated and permanently branded with police records. The public, the Commission found, is aware and extremely upset by this fact. Resultingly, they have expressed the opinion that the present laws should be revamped to be made more lenient.

V. Marihuana and Social Policy

A recognized conflict exists in our society between individual liberty and social restraint. This conflict is nowhere more evident than in the marihuana controversy. Consequently the Commission sought to evaluate the various approaches used to control marihuana. One such approach is the approval of marihuana use, but the Commission believed that such an attitude would only encourage some people to use the drug who otherwise would not be so inclined. This would most likely increase the heavy or irresponsible uses. On the other hand, an approach towards elimination of use is likewise not feasible, if for no other reason than it would require a great increase in manpower and resources to achieve the end desired. In deference to the above mentioned approaches, the Commission concluded that an attitude of discouragement should be adopted with concentration on the prevention of heavy and very heavy usage. A part of the Commission's reasoning is that marihuana use is a fad and if not institutionalized will recede substantially in time. However, implementation of such a policy would be very difficult to enforce. This is exemplified in similar policies restricting tobacco and alcohol use by the young, yet their enforcement has been far from effective.

Possession and use of marihuana generally refers to a form of behavior indicatively personal that takes place in private. The only social consequences identified from such behavior occur when such usage becomes heavy to very heavy. Based on this knowledge the Commission concluded that the present criminal laws for personal possession are too harsh to achieve a policy of discouragement. The harm, whether real or fantasy, that results from marihuana use is not great enough to warrant intrusions by criminal law into private behavior. In order to overturn existing criminal laws, the Commission presented several possible constitutional issues. The gist of these issues is that the government lacks the power to invade the privacy of an individual and regulate his conduct unless such conduct presents a direct injury to society.

The effectiveness of our present prohibitory laws concerning the possession and use of marihuana is nebulous. The belief that possession

penalties are instrumental in coercing users to reveal their sources has been proven to have little validity. The normal user is too low in the chain of distribution to have any effect on the diminishment of drug sources. Another grave consequence of the present drug laws is that the vast increases in prosecutions has clogged judicial calendars. Based on such reasoning, the Commission believes that current possession penalties do little to further the discouragement policy. Rather, possession penalties result in heavy social costs, not the least of which is the disrespect and cynicism exhibited by some of the young. On the other hand, the Commission also rejected the regulatory or legalization scheme because of the uncertainty surrounding possible long term effects. Instead, the Commission recommended a policy of partial prohibition which would continue to make the production and distribution of the drug a criminal offense while removing existing criminal sanctions for private possession and use. The Commission further recommended confiscation and fines for public use of the drug but discontinuance of any criminal action. These recommendations reflect the changes that the Commission felt should be made to present federal law. In addition, the Commission proposed that the casual distribution of small amounts of marihuana for little or no remuneration be decriminalized. Nevertheless, marihuana intoxication would not be a defense to any criminal act or intent. The Commission also made specific recommendations for state law which would continue to make the production and sale for profit of the drug a criminal offense while alleviating such penalties for private possession and use and making public use a low grade crime punishable by a fine.

The Commission deserves praise for the rigorous analysis and evaluation of prevailing theories that marihuana use is harmful. The Commission's report represents a fresh and unbiased attempt towards evaluating legislation in a new and promising way. The cogent and comprehensive manner displayed by the Commission in its attempt to demythologize current beliefs concerning marihuana reflects a sincere desire to place marihuana use in its proper perspective in relationship to American society. The Commission's recommendation to discontinue the present prohibitory controls in favor of a discouragement policy with concentration on prevention and treatment of heavy and very heavy use represents a rational and practical approach to the problem. The current criminalization of marihuana possession for personal use is socially self-defeating as a method of achieving the desired means. This study has succeeded in demythologizing, desymbolizing, and de-emphasizing, the false beliefs concerning marihuana. Based on evidence presented, it is quite obvious that marihuana does not constitute a valid social problem in contemporary America. In fact, existing social and legal policy is out of proportion to the potential individual and social harm that the use of the drug might generate. Based on the existing situation and evidence presented, the Commission's recommendations for changes in current federal and state law reflect the only rational and feasible answer. The adoption of such changes in the law could well act as a catalyst for bringing certain fragmented segments of American society back together again.

Joel W. Bunkley, III

DIRECTORY
MISSISSIPPI STATE BAR

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120 Big Star Building
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AMORY

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Billy James Funderburk
North Main Street
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Route 2
Jack N. Thomas
Box 267
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Chancellor 1st District

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P. O. Box 125
John B. Farese
P. O. Box 98
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P. O. Box 125
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P. O. Box 121

AVALON

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M. Paul Haynes, Jr.
P. O. Box 278

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P. O. Box 121
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BENOIT

Lloyd E. Hogue

BEULAH

Dixon Dossett

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Gertrude S. Armstrong
Box 486
Col. Samuel E. Birdsong, Jr.
318 Vandenberg Drive
Gerald Blessey
Box 548
Billy F. Brown
Box 506
Amy Burkett
Rt. 3, Box 353

Cono A. Caranna, II
505 Lanicuse Street
Fred G. Cody
210-210A Roland Bldg.
John Byron Coggin
Box 1061
L. C. Corban, Jr.
Box Q
Earl Lamar Denham
1117 West Howard Ave.
William L. Denton
450 Reynoir Street
Frederick L. Donahower
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Shopping City
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Box 153
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Garden Apt.
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P. O. Drawer MM
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P. O. Box 541
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Cecil G. Johnson
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Don W. King
Box 223
Arnaud O. Lopez
202 Barq Building
Frederick J. Mannino
110 West Howard Ave.

Nick A. Mavar, Jr.
1214 West Beach
Howard McDonnell
Barq Building
Jimmy Dale McGuire
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Box 222
Ronald Peresich
Box 222
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111 Linda Drive
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Victor B. Pringle
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Victor B. Pringle, Jr.
129 West Jackson
Walter E. Ross, Sr.
Box 238
John Sekul
203 Barq Building
Lawrence Semski
1604 Donwood Place
Roland Benjamin Skinner
177 Reynoir Road
Sanford R. Steckler
Box 486
Paul R. Tarbutton
239 Langley Drive
Charles L. Todaro
1136 West Howard Ave.
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Box 272
Kosta N. Vlahos
Box 36
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Box 548

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175 Oak Grove Place
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Edgewater Gardens
Apt. 2G
Thomas J. Wiltz
Box 302
Thelma S. Zinner
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Schultz Building
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P. O. Box 146
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Box 3-B
Ellis W. Finch
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Donald Franks
Eugene B. Gifford, Jr.
P. O. Box 254
James N. Godwin
P. O. Box 687
Thomas Douglas Keenum,
Sr.
P. O. Box 267
Joe Ray Langston
College Street
Edgar Watson Massey
Box 421
Joseph L. McCoy
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Jerry T. Johnston
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Rankin Co. Bank
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Box 25
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J. David Williams
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Tullius Brady
Box 115
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Chancellor
P. O. Box 52
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Box 774
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Box 356
Henry W. Hobbs, Jr.
Box 356
Robert E. Jones
220 South First Street
Jerrald L. Nations
P. O. Box 867

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207 South Railroad Ave.
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P. O. Box 242
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220 South First Street
Ralph L. Peebles
P. O. Box 356
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P. O. Box 425

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Circuit Court 3rd District
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Paul M. Moore
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232 West Peace St.
Nelson R. Cauthen
John W. Christopher
Route 4, Box 14
Hermon Dean

Sim C. Dulaney, Jr.
Rt. 3, Box 34-B

Joe R. Fancher, Jr.
P. O. Box 245

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114 West Center Street
J. M. Greaves
Box 128

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11th District

James H. Herring
P. O. Box 344

Josephine Hood
S. T. Lloyd, Jr.
133 South Union Street

Ray H. Montgomery
324 Shady Lane

Robert Montgomery
232 West Peace Street
Judge Percy F. Parker
Co. Court Madison Co.

Robert H. Powell, Jr.
Box 245

William Larry Smith-Vaniz
232 West Peace St.

L. G. Spivey, Jr.
P. O. Box 8

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CARTHAGE

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Box 387

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P. O. Box 48

Judge O. H. Barnett
Circuit Court

Robert Norman Brooks
P. O. Box 48

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205 Main Street

Harold W. Davidson
J. O. Hollis
Box 305

James G. McLemore, Jr.
P. O. Box 387

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303 Van Buren Street

J. E. Smith
Box 387

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Cossar Building
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Bank of Clarksdale

Edward P. Connell
P. O. Box 368

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P. O. Box 786

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Box 1116

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601 East Second Street

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Box 100

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Box 865

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P. O. Box 966

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Box 368

Joseph W. Hopkins
Stevens Building

David R. Hunt
123 Court Street

Linda Bon Lipe
47 Delta Avenue Apt. 106

Stovall Lowrey
P. O. Box 662

Semmes Luckett
121 Yazoo Avenue

William O. Luckett
P. O. Box 306

Lawrence M. Magdovitz
P. O. Box 997

Sidney A. May
P. O. Box 237

William O. Mayfield
253 Delta Avenue

William H. Maynard
P. O. Drawer 488

Charles Michael Merkel, Jr.
Box 836

Ralph G. Metcalfe
Box 641

Leighton S. Miller
Box 787

Doyle Benton Moorhead
419 West Second

G. Rives Neblett
Box 368

Edward P. Peacock, III
Route 1, Box 652

Thomas H. Pearson
P. O. Box 912

Leon L. Porter, Jr.
Box 413

Greek P. Rice
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Shed Hill Roberson
121 Yazoo Avenue

Harvey T. Ross
Box 22

Tom T. Ross
Box 339

Lester M. Sack
Box 626
Allen D. Shackelford
P. O. Box 306
Phillip A. Sherman
Suite 204 Stevens Bldg.
Elzy J. Smith, Jr.
123 Court Street
Charles L. Sullivan
123 Court Street
Walter W. Thompson
P. O. Box 1196
Grady F. Tollison, Jr.
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900 Maple Street
Robert F. Wood
647 Cherry Street
Howard G. Woodward
Box 876

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Judge William H. Bizzell
P. O. Box 117
Stephen W. Blackburn
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112 North Pearman Ave.
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522 Robinson Drive
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P. O. Box 159
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Charles C. Jacobs, Jr.
P. O. Box 159
Robert G. Johnston
112 North Pearman Ave.
Alfred A. Livingston
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P. O. Box 159
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Donald L. Moak
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Dana C. Moore, Jr.
116 South Court St.
William E. O'Hare
P. O. Box 630
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105 South Court Street
A. B. Sparkman
James Irving Tims
Box 700
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Arthur C. Whittemore
609 John Drive
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137 Murial Drive
Edwin K. Clayton
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Stephen L. Guice
1104 East Northside Dr.
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Mississippi College
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800 East Leake Street
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1210 Manchester

Ewell McDonald, Jr.
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C. G. Muse, Jr.
541 Belle Vue Street
Percy Howard Parkman
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John H. Rogers
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W. A. Thornton
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805 East Leake Street
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COFFEEVILLE

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310-312 Newsom Bldg.
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1107 Maxwell Street
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Sebe Dale
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Maurice Dantin
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Ernest R. Duff
216 Newsom Bldg.
Richard D. Foxworth
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Toxey Hall
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Philip Singley
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Box 9
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James Albert Dale, III
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Gary L. Geeslin
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516 North Second Avenue
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Thomas Clower Harvey, Jr.
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Robin Weaver
Box 1003
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COMO

J. M. Stockton
Rt. 1, Box 57

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James W. Abernethy, Jr.
Box 811
W. C. Adams
James S. Armstrong
818 Shiloh Rd., Apt. 105
Neal B. Biggers, Jr.
402 Franklin Street
Aubrey Horace Brewer
Drawer B
David Lee Coleman
Box 191
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Drawer 311
Judge Orma R. Smith
U. S. District Court
Orma R. Smith, Jr.
P. O. Box 191
N. S. Sweat
P. O. Box 227

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Route 3, Box 311

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Osborn G. Idom
P. O. Box 336
James Walter Lee
Box 385
Roy Noble Lee
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612 Marion Blvd.
William C. Thompson
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Box 247
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P. O. Box 247

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Euple Dozier
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536 Washington Ave.
Marvin Burchfield
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Frank Carlton
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Anse Dees
Box 460
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Howard Dyer, III
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Guy Kenner Ellis, Jr.
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P. O. Box 874
William Roy Ford
274 Bermuda Drive
L. Carl Hagwood
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Frank Watson Hunger
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Box 737
Judge William C. Keady
P. O. Box 190

William C. Keady, Jr.
P. O. Box 895
Judge Ernest Kellner, Jr.
Chancellor 9th District
Martin A. Kilpatrick
Box 773
Raymond V. Kimble, Jr.
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J. A. Lake, Jr.
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Box 773
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P. O. Box 660
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Box 558
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Box 1334
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Abraham Building
Judge Zelma W. Price
Box 766
Tony P. Provenza
1208 Fairview Avenue
Eugene J. Raphael
Woolworth Building
James Robertshaw
P. O. Box 99
James L. Robertson
P. O. Box 895
George Ramsey Russell
Room 214-220
Weinberg Bldg.
Laurance J. Sievers
P. O. Box 506
George H. Slade
P. O. Box 1214

Earl Solomon
P. O. Box 453
Earl S. Solomon, Jr.
P. O. Box 453
Walter B. Swain, Jr.
P. O. Box 4874
Crossroads Station
William D. Swain, Jr.
731 Hart Drive
Clayton J. Swank, III
217 Bermuda Drive
John William Tarver
Box 918
Phillip Baird Terney
P. O. Box 99
Frank S. Thackston, Jr.
Box 918
S. B. Thomas
P. O. Box 395
William Thomas, Jr.
211-212 Weinberg Bldg.
W. Scott Thompson
222 W. Yerger Street
Charles S. Tindall
Box 918
Charles Summer
Tindall, III
P. O. Box 918
Lawrence Douglas Wade
Box 895
James Marvin Ward
125 Sherwood Drive
Rodger Downing Wasson
Box 1205
J. Wesley Watkins, III
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Taylor Webb
313 South Washington
Burwell B. Wilkes
Circuit Judge
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Box 812
Douglas C. Wynn
Box 1295

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P. O. Box 941
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Robert Murray Carpenter
115 Howard Street
Travis H. Clark, Jr.
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Drawer 1180
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Drawer B
Gray Evans
Box 411
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John J. Fraiser, Jr.
P. O. Box 391
William W. Franklin
Box 1176
Andrew Marlowe Gambrell
127 Johnson Street
Arnold F. Gwin
P. O. Box 1176
Sidney A. Harris
1500 Commerce Street
James E. Higginbotham
P. O. Box 366
O. L. Kimbrough
Box 516
David Michael Lipman
109½ Johnson Street
Hardy Lott
P. O. Box 1176
R. Cunliffe McBee
Drawer 657
George Hite McLean
P. O. Box 516
Pearl McLellan
Box 54
Floyd M. Melton, Jr.
417½ Bell Avenue
W. H. Montjoy
Box 906
Yerger Morehead
Whittington Bldg.

Thomas Morris
Box 1909
Whitman D. Mounger
122 Riverside
Frank K. Odom
P. O. Box 674
H. Talbot Odom
Drawer 1218
Porter W. Peteet
Box 263
James M. Pierce
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804 Bell Avenue
Richard L. Smith
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Waldo Sterling Stuckey, Jr.
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Anthony Lavon Thaxton
Box 146
James E. Upshaw
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Charles Leroy Whitam
Drawer D
W. M. Whittington, Jr.
P. O. Box 941
Fred Witty
P. O. Box 921
GRENADA
Edwin Tharp Cofer
Jim McRae Criss
P. O. Drawer C
Floyd M. Davis, Jr.
1584 Vance Road
William H. Fedric
North Side of Pub. Square
Jay Gore, Jr.
Box 901
John T. Keeton
P. O. Box 666
Lucille T. Latta
P. O. Box 922

Mitchell M. Lundy
11 Evans Building
Judge Marshall Perry
P. O. Box 444
Leon E. Provine
P. O. Box 99
William O. Semmes
P. O. Box 567
Samuel J. Waits
Box 204
GULFPORT
Bidwell Adam
P. O. Drawer BB
Harry Roger Allen
P. O. Box 996
Judge Frank W. Alexander
P. O. Box 986
Wade Baine
P. O. Box 1834
Robert Barber, Jr.
P. O. Drawer DD
Peter Hickman Barrett
806 Second Street
Thomas Henry Barrett, Jr.
630 Second
John H. Barnett, Jr.
915 Wanda Place
Thomas Davis Berry, Jr.
1319 24th Avenue
Charles G. Blackwell
203 Gulf South Bldg.
Leonard A. Blackwell, II
1611 - 23rd Avenue
W. Joel Blass
Box 160
Eldon Bolton, Jr.
P. O. Box 100
Luther R. Boyd
Hancock Bank
Trust Department
Norman Breland
Box 396
Rae Bryant
P. O. Box 10
Thomas Ware Burt
206-207 Security Sav. Bldg.
Anthony J. Caranna
1225 31st Avenue
Pete H. Carruba
P. O. Drawer W

- Napoleon Lepoint
Cassibry, II
Box 1686
Roger T. Clark
P. O. Box 179
David Leroy Cobb
Box 996
Everett E. Cook
Drawer C
Bruce G. Cornell
3rd Floor Hewes Bldg.
David Cottrell, Jr.
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Jimmy G. Dedeaux
406 Hewes Building
Harold Joseph Demetz
P. O. Box 1686
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P. O. Drawer H
G. E. Estes, Jr.
Box 88
William Estopinal
Medical Building
Milton Ray Fairchild
1919 15th Street
Captain Mark T. Finch
USAF
1101 Beach Avenue C-12
Margaret E. Fisher
609 Woodward Avenue
Jason H. Floyd
P. O. Box 1107
Jason H. Floyd, Jr.
Box 1107
E. J. Ford, Jr.
201 Hatten Bldg.
Paul M. Franke, Jr.
Drawer 100
Edward Gaines
2209 14th Street
Charles R. Galloway
P. O. Drawer H
James Babington Galloway
Drawer H
Robert Charles Galloway
Drawer H
- John M. Gardner
1425 24th Avenue
Virgil G. Gillespie
Box 507
D. M. Graham, Jr.
P. O. Box 22
Richard B. Graves, II
Suite 100, 2120 Building
2120 14th Street
P. D. Greaves
Suite 308 Gulf
National Bank Bldg.
Ben A. Hardy
Box 1107
Roger Dean Harris
Room 308 Gulf
South Building
T. J. Buchanan Heiss
1503 24th Avenue
John F. Hester
Bayou View Apts. Apt 7-H
Jody Nelson Drive
Harry P. Hewes
304 Hewes Building
Box 992
Gaston H. Hewes
Hewes Building
Judge William G. Hewes
P. O. Box 454
Viola J. Hilbert
Box 4043
Forrest E. Holder
22 Poplar Circle
Boyce Holleman
P. O. Drawer 1030
Alben N. Hopkins
P. O. Drawer W
Raymond Hunter
Box 88
Robert E. Husband
Suite 302 Gulf So. Bldg.
John C. Johnson
303 Gulf South Bldg.
Walter R. Johnson
211 Gulf S. Bldg.
Walter Rayford L. Jones
P. O. Box 1504
Oscar B. Ladner
Box 727
- Eaton A. Lang, Jr.
P. O. Drawer H
Larry Lee Lenior
Box 507
Aristide F. Lefevre, Jr.
1911 24th Avenue
Edward M. Lindsey
Box 524
Henderson C. Lindsey
Box 279
Floyd J. Logan
Box 1769
William E. Logan
309 Hatten Building
Ernest G. Martin, Jr.
P. O. Box 730
James M. McCarthy
Box 10
Joseph R. Meadows
Suite 100, 2120 Building
R. B. Meadows
Box 402
Robert H. Milner, Jr.
P. O. Box 579
Webb M. Mize
310 Gulf National Bank
Building
John S. Morris
1214 24th Avenue
George E. Morse
P. O. Box 100
Stanford E. Morse, Jr.
P. O. Box 100
Sherman L. Muths, Jr.
Albert Necaise
Courthouse
Paul M. Newton
2414 Fourteenth Street
H. G. O'Connor
4512 Jefferson Avenue
Edgar L. O'Neill, Jr.
2513 Palmer Drive
Joseph Sam Owen
Box 673
Owen T. Palmer, Jr.
P. O. Box 717
Robert D. Portwood
P. O. Drawer 760
George M. Quin
454 Champin Street

William M. Rainey
P. O. Drawer S
James Norman Randall, Jr.
P. O. Box 749
George Grover Rayborn, Jr.
211 Bridges Building
Brent A. Richardson
P. O. Box 4051
Donnie D. Riley
Suite 100, 2120 Building
Grover Roberts
Box 992
Thomas N. Roberts, Jr.
P. O. Drawer Y
Jimmie W. Rose
1255 24th Street
George Rosetti, Jr.
P. O. Drawer Y
Scotty R. Rosetti
Box 1297
Ernest L. Shelton, III
Box 631
James Sideris
Box 819
Donald O. Simmons
P. O. Box 1206
George R. Smith
Box 177
Lee R. Spence
Trust Department
Hancock Bank
Thomas L. Stennis, II
P. O. Box 10
William L. Stewart
P. O. Box 717
Ben H. Stone
P. O. Drawer H
Thomas B. Sumrall
Hatten Building
Charles T. Sykes, Jr.
1225 Thirty First Ave.
Robert L. Taylor
P. O. Box 730
Jerry O. Terry, Sr.
Suite 308 Gulf National
Building
Hollis C. Thompson, Jr.
310 Gulf National Bank
Building

McRae Turner, Jr.
Mississippi Power Co.
Dr. Fred Haden Walker
400 Pass Road
Judge Harry G. Walker
P. O. Box 1529
Knox W. Walker
408 Hewes Building
Gerald M. Warren
Box 1506
Knox White
P. O. Drawer 100
Neil W. White, Jr.
412 Hewes Building
Marguerite L. Williams
1805 19th Avenue
Richard L. Yarbrough
P. O. Box 1138
Ralph D. Young
P. O. Drawer Y

GUNTOWN

James W. Bingham
Box 25

HATTIESBURG

Lawrence D. Arrington
Box 1292
Robert E. Arrington
P. O. Box 22
Bruce C. Aultman
P. O. Box 750
Dorrance Aultman
P. O. Box 750
B. H. Baker
Box 801
Stone D. Barefield
121 West Front Street
J. C. Bell
P. O. Box 566
M. D. Brett
P. O. Box 189
Giles Wheeler Bryant
3801 Pearl Street
Robert L. Calhoun
Box 1933
Lester Clark
302 First Federal
Building
Judge Harold B. Cubley
P. O. Box 969

Edward J. Currie, Jr.
P. O. Box 2044
George Gibon Currie
Box 626
George C. Curry
P. O. Box 1709
Malcom Ronald Doleac
Box 1169
James K. Dukes
P. O. Box 2055
S. Wayne Easterling
P. O. Box 870
Henry King Farmer
P. O. Drawer 1390
Samuel E. Farris
1304½ West Pine St.
James Finch
P. O. Box 1169
Lawrence Y. Foote
Drawer 1231
Davis T. Fortenberry
Route 3, Box 186
Herbert R. Ginsberg
First Federal Building
Suite 304
Mayor Paul E. Grady
Box 1769
Reginald A. Gray, Jr.
Drawer 1975
Reginald A. Gray, III
Drawer 1975
John S. Grove
Box 1024
Wallace R. Gunn
Suite 102
Family Reserve Life Bldg.
Judge Stanton A. Hall
P. O. Box 135
William Haralson
P. O. Box 2054
F. C. Hathorn, Jr.
Box 865
Rowland W. Heidelberg, Jr.
301 West Pine Street
Robert E. Hill
702 Myrtle Street
Paul H. Holmes
P. O. Box 2055
John Roane Howell
518 Rebecca Avenue

Carroll H. Ingram
Box 24
Robert T. Jackson
Drawer 1975
Rex K. Jones
P. O. Box 125
William F. Jones
Box 95
Marie P. Kepper
702 West Pine Street
Karl W. Kepper
702 West Pine Street
Joe R. King
Box 1207
Raymond L. Laakso
Route 10, Box 99
University Place
John Wincie Lee, Jr.
Box 654
Jolly W. Matthews
P. O. Box 24
James F. McKenzie
301 West Pine Street
Richard W. McKenzie
Box 1403
Frank Wilson McLendon
417 Meadowlake Village
Richard L. Miller
3002 Prince George Road
Frank D. Montague, Jr.
Drawer 1975
Alfred Moore
Box 95
Henderson A. Moore
Box 95
C. M. Morgan, Jr.
Box 1333
Forrest M. Morris, Jr.
142 East Front Street
John Alan Morris
Box 109
William V. Murry
204 Conner Building
Larry Norris
401 South Main Street
Mildred W. Norris
P. O. Box 1633
Thomas D. Ott
P. O. Box 1386

Judge Howard L. Patterson
P. O. Box 808
William Lawrence Peebles
3308 Adeline Street
Edwin Lloyd Pittman
Carter Building
Jack Homer Pittman
Suite 407 Carter Building
James C. Pittman
Suite 407 Carter Building
Moran M. Pope, Jr.
P. O. Box 750
William F. Porter
Box 2059
Southern National Bank
Thomas J. Riley
P. O. Box 654
M. M. Roberts
Box 870
Shelby R. Rogers
P. O. Box 109
Donald B. Ruiz
Route 2, Box 394-A
Milton A. Schlesinger
Suite 304
First Federal Building
Elliott E. Schlottman
P. O. Box 1902
J. B. Van Slyke, Jr.
Box 750
Luther A. Smith
Box 1386
Billy H. Stephens
Box 1606
Howard M. Stroud
Box 24
Michael David Sullivan
306 Carter Building
R. M. Sullivan
112 East Front Street
Dan Gary Sutherland
Second Floor
301 West Pine Building
301 West Pine Street
James H. C. Thomas, Jr.
Suite 210, Carter Bldg.
Melvin M. Thomas, Jr.
200 29th Avenue
Joe A. Thompson
Box 348

James K. Travis, Jr.
P. O. Box 590
Thomas Ward Tyner
Box 750
Jack B. Weldy
P. O. Box 24
Ben M. West
1208 Carter Drive
William W. Wicht, Jr.
Suite 100
Professional Building
Francis T. Zachary
P. O. Box 24

HAZLEHURST

S. E. Allen, Jr.
P. O. Box 208
Cecil L. Allred, Jr.
408 Gallatin Street
John T. Armstrong
P. O. Box 190
John T. Armstrong, Jr.
P. O. Box 190
E. R. Arrington
Drawer 650
Donald C. Cooley
P. O. Box 388
Harris B. Henley
Box 509
W. S. Henley
Box 509
Harry O. Hoffman, Jr.
Box 190
Carroll Kemp
P. O. Box 226
Julius L. Lotterhos, Jr.
Box 509
Charles A. Ray, Jr.
Box 862
Lena C. Zama
P. O. Box 108

HEIDELBERG

John M. Sims
Box 412

HERNANDO

James Ward Amos
19 Union Street
William W. Ballard
Desoto County

Dudley Black Bridgforth, Jr.
C/O Walker Franks & Rone
Gerald Wilborn Chatham, Jr.
53 East Center Street, S E
Ross Lee Franks
Boyce Lee Garner
19 Union Street
Harry Randolph Garner
19 Union Street
William F. Hagan, Jr.
Box 346
F. C. Holmes, Jr.
Richard J. Lee
P. O. Box 373
Jon Bartlett Love
19 Union Street
Cinclair May
19 Union Street
George S. McIngvale
William L. Rone
Joel P. Walker
Edward Lee Whitten
19 Union Street
W. E. Wilroy
Box 5
W. E. Wilroy, Jr.
Box 5
James E. Woods
McIngvale Building

HICKORY

S. E. McGee

HOLLANDALE

William T. Bundy
503 Church Street
John Robert Nunnery, Jr.
616 Church Street
Forrest Durwood Ruegger
P. O. Box 542

HOLLY SPRINGS

Fred M. Belk, Jr.
Box 475
John W. Bryant, Jr.
Merchants & Farmers
Bank Building
Robert P. Crutcher
Box 66

Wall Doxey, Jr.
P. O. Box 667
L. Glenn Fant, Jr.
P. O. Box 66
Sidney L. Hurdle
First State Bank Building
William G. Kemp
Box 266
John L. Kennedy
North Side of Square
D. Rook Moore, III
P. O. Box 66
George H. Rather
Fred E. Swaney
Van Dorn Avenue
James W. Warren, Jr.
Box 417

HOUSTON

Woodrow Wilson Brand, Jr.
Box 128
Thomas B. Davis
432 South Jackson Street
John P. Fox
P. O. Box 167
James S. Gore
P. O. Box 367
A. E. Hawkins
Box 266
James M. Hood, Jr.
Box 246
Rex Franklin Sanderson
Box 167

INDIANOLA

Richard M. Allen
P. O. Box 688
W. Dean Belk, Jr.
P. O. Box 229
Joe M. Buchanan
P. O. Box 654
Judge Arthur B. Clark
Box 229
Frank O. Crosthwait, Jr.
100 Court Street
Howard Q. Davis
Box 229
Howard Q. Davis, Jr.
Box 229
Aaron M. Edwards
210 Sunflower Avenue

Don Oliver Gleason
P. O. Box 1018
John T. Haltom
Box 654
Hugh Lumpkin
705 East Gresham Street
Gordon L. Lyon
100 Court Street
J. H. Price
David M. Quinn, Jr.
Box 175
G. P. Ritchey
Box 628
Champ T. Terney
100 Court Street

ISOLA

John Walter Garrard
P. O. Box 173

ITTA BENA

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Box 543
George H. Dulin
313 Lakeshore Street
Perry W. Morton
Box 82

IUKA

Richard O. Clark
P. O. Box 319
James Barry Finch
Box 335
J. D. Finch
Harold Stephen Jackson
Box 319
William Carr Lowrance
Route 4
Hubert D. Stephens
Box 319
Cecil L. Sumners
311 South Fulton Street

JACKSON

Annie Lou Abel
2914 Shelia Drive
Thomas G. Abernethy, Jr.
5811 Kings Place
James Milton Abram
121 North Farish Street
Jesse R. Adams, Jr.
Box 504

- L. M. Adams
5025 Wayneland Drive
Apt. C-4
Virgil C. Adams, Jr.
1645 Meadowbrook Road
Lee B. Agnew, Sr.
418 Yazoo Street
Lee Bryant Agnew, Jr.
5573 Hartsdale Drive
John E. Aldridge
Box 1699
Chalmers W. Alexander
Box 291
Firnist J. Alexander, Jr.
2205 Guynes Avenue
James Alexander, Jr.
Box 410
Julian Alexander
Box 1367
Paul G. Alexander
401 Barnett Building
William A. Allain
P. O. Box 220
James E. Allen
P. O. Box 1200
Leigh B. Allen, III
P. O. Box 119
Michael S. Allred
Box 157
Sam S. Allred
405 Tombigbee Street
Patricia Ann Almon
1816 Parkridge Drive
Alex Alston
Drawer 1532
Lester Alvis, Jr.
P. O. Box 1507
Daniel Thomas Anderson
P. O. Box 263
Reuben Vincent Anderson
1206 Dewey Street
Carl F. Andre
4445 Audubon Park Dr.
Lloyd Arnold
Box 22622
George M. Arthur
5705 Ridgewood Road
Ronald Neely Ashley
1455 Dianne Drive
B. Galloway Austin
217 South State Street
Roy G. Ayles
2429 Nottingham Road
William A. Bacon
Box 15
James T. Baggett
5655 Clinton Boulevard
Fred L. Banks, Jr.
Drawer 290
Taunya Marita Banks
2361 Montbella Drive
Ray Bailey
Box 136
Louis G. Baine
Box 22489
Maston L. Ballew, III
Box 2344
Mills Eugene Barbee
540 East Northside Drive
Judge Charles T. Barber
County Court House
Frank D. Barber
Box 849
Harold J. Barkley, Jr.
Box 1482
Judge James A. Barnett
Box 686
Robert G. Barnett
Box 1200
Ross R. Barnett
P. O. Box 1288
Ross R. Barnett, Jr.
Box 1288
William Ralph Barnett
611 Barnett Building
Catherine L. Barter
Box 22547
Billie R. Barton
1256 Wooddell Drive
David C. Barton, III
Box 395
Stephen L. Beach, Jr.
P. O. Box 663
Stephen L. Beach, III
P. O. Box 663
Loyd Lamar Beacham, Jr.
822 Plaza Building
Wirt Adams Beard
715 North State Street
Bobby Ray Beatty
3323 Lisa Drive
James A. Becker, Jr.
Box 650
Thomas A. Bell
P. O. Box 1084
J. A. Bellan, Jr.
P. O. Box 3609
Marshall G. Bennett
282 Sun Drive
Richard Girsham Bennett
Box 1972
Richard Thomas Bennett
P. O. Box 326
Walter Berry
Box 1199
Robert A. Biggs, Jr.
P. O. Box 1370
Richard A. Billups, Jr.
P. O. Box 1056
Alvin Binder
P. O. Box 25
Melvin B. Bishop
Box 2366
Walter R. Bivins
235 Cooper Road
D. Carl Black, Jr.
Box 22567
Maurice Black
P. O. Box 220
William P. Black
5939 Baxter Drive
Jerry William Blakeney
Box 5025 Fondren Station
Jack W. Blasingame
Box 9463
Northside Station
Jerry H. Blount
Suite L
120 Capitol Towers
Jerry Holmes Blount
Box 2366
Singleton Smith Bonner
Box 528
Grover L. Boone
1029 Eculid Avenue
James A. Boone
P. O. Box 2182

- Carl C. Bostic
200 South President
Barnett Building
Francis S. Bowling
425 Tombigbee Street
Hartwell Bowling
Box 78
Richard C. Bradley
406 Rollingwood Drive
Richard C. Bradley, III
406 Rollingwood Drive
Joe Alister Brady, Jr.
987 East Northside Drive
Apt. 5-2B
Judge Tom P. Brady
New Capitol
Bill Claud Breazeale
Box 9461 North Station
Dan E. Breland
P. O. Box 765
Charles A. Brewer
P. O. Box 1631
Thomas J. Brewer, Jr.
Box 5602
Billy G. Bridges
P. O. Box 5767
Kenneth M. Britt
Suite 1829 Deposit
Guaranty Bank Building
John C. Brittain
233 North Farish Street
Charles L. Brocato
P. O. Box 22
Harmon W. Broom
Box 1275
R. H. Broome
P. O. Box 5915
Jackson Martin Brown
155 South Green
Joseph E. Brown, Jr.
Box 2091
J. T. Brown
P. O. Box 291
Perry E. Brown
4214 Oak Hill Drive
R. Jess Brown
125½ North Farish Street
William Howard Brown, Jr.
690 First National Bank
Building
W. F. Browning, Jr.
4730 Shadow Wood Drive
Douglas H. Brumfield
165 Carmel Avenue
E. L. Brunini
P. O. Box 119
Edmund Lawrence
Brunini, Jr.
P. O. Box 119
Henry Warren Bryan
Box 391
Clifton E. Bryant
4250 Athens Drive
Noel W. Buckley
1251 First Avenue
Cary E. Bufkin
Box 157
James D. Buford
Box 157
Donald V. Burch
Box 1084
Delos H. Burks
New Capitol
Robert Burns
P. O. Box 131
Jack C. Burrell
P. O. Box 78
W. A. Busby
754 North President
Charles Crawley Bush
Box 12116
George H. Butler
Box 22567
Wilton Vance Byars
1617 Wilhurst Street
Frank Cabell
430 South Farish Street
Joseph B. Cadwallader
245 Sykes Road
James M. Cain
Box 12447
James E. Caldwell
1230 Saint Ann Street
T. Eugene Caldwell
P. O. Box 1704
K. Hayes Callicutt
Box 157
Robert C. Cannada
Box 22567
John W. Capers
1839 Shady Lane Drive
Natie P. Caraway
Box 651
Taylor Carlisle
756 East Northside Drive
Charles Collier Carlton
5845 Kings Place
Geraldine H. Carnes
1380 Lavernet Road
Apt. 3
Lyle Carroll
P. O. Box 1136
Charles A. Carter
P. O. Box 2216
William O. Carter, Jr.
P. O. Box 651
Craig Castle
P. O. Box 566
Edward L. Cates
P. O. Box 2005
Vernon Henry Chadwick
711 Electric Building
Reynolds Cheney
Box 1666
James K. Child, Jr.
Box 651
W. M. Childress
P. O. Box 12
Bernard W. Chill
P. O. Drawer 2427
Clifford C. Chittim
Box 427
Anson Bob Chunn
2419 Nottingham Road
James Steven Chustz
1840 Devine Street
Judge Charles Clark
United States Court
House
Grover C. Clark
140 West Pearl Street
Hollis M. Clark
135 Sivley Avenue
John Clark
Box 1084
Neal Clement
1411-13 Standard Life
Building

- James L. Clemons
1105 Garden Park Drive
William Thad Cochran
P. O. Box 650
J. W. Cocke
1339 Deposit Guaranty
Bank Building
Dr. John V. Cockrell
1816 St. Ann Street
Marvin A. Cohen
P. O. Box 427
Curtis E. Coker
Box 1084
Walter D. Coleman
754 North President St.
William Dewitt Coleman
828 Briarfield Road
William F. Coleman
425 Tombigbee Street
Aline J. Collum
416 Plaza Building
James Ousley Conner
821 Madison
Henry D. Cook
1216 Raymond Road
Robert F. Cooper, Jr.
1335 Linden Place
James P. Cothren
425 Tombigbee Street
John R. Countiss, III
P. O. Box 241
Hansell August Courtney
1239 Deposit Guaranty
National Bank Building
Bobby Louis Covington
P. O. Drawer 2428
Tom Coward, Jr.
Box 22547
Justin Lamar Cox
P. O. Box 22489
Judge William Harold Cox
P. O. Box 2447
William Harold Cox, Jr.
Suite 1741 Deposit
Guaranty Bank Building
Merrida Powell Coxwell
P. O. Box 10332
John A. Crawford
Box 22567
Robert A. Crawford
418 Yazoo Street
James Hiram Creekmore
628 Electric Building
Rufus Creekmore
822-25 Plaza Building
Wade H. Creekmore
1000 Plaza Building
Wade H. Creekmore, Jr.
628 Electric Building
Thomas R. Crews
P. O. Box 410
Alfred N. Crisler
431 Tombigbee
Court Square
Bert Crisler
813 Deposit Guaranty
Bank Building
Charles W. Crisler, Jr.
431 Tombigbee
Court Square
Tom Crockett
Box 22628
Earl R. Cruthirds
4580 Old Canton Road
E. Hugh Cunningham, Jr.
P. O. Box 1288
Danny Cupit
Box 916
Arthur Dale Currie
Box 1322
William M. Dalehite, Jr.
Box 651
Joe H. Daniel
Box 1084
Dale Danks, Jr.
623 Bankers Trust
Plaza Building
R. A. Darden
3438 Old Canton Road
Thomas Edwin Davidson
Box 663
Charles R. Davis
Drawer 1532
Jack Roy Davis
814 North Jefferson St.
Colonel James L. Davis
110 Poinciana Drive
Walter Dell Davis
406 Farm Bureau Federal
Building
Joe Sanford Deaton
4243 Meadowlane Drive
Joe Dehmer, Jr.
Box 1012
Henry Lee Denton, Jr.
5372 Jamaica Drive
Albert Dickens, Jr.
Box 744
R. R. Dinsmore
4096 Redwing Avenue
John Kane Ditto, Jr.
1517 St. Ann Street
J. Hubern Dodd
Box 92
Warren C. Dorsey, Jr.
Box 1200
Richard W. Dortch
P. O. Box 119
James K. Dossett
1801 Deposit Guaranty
Bank Building
James K. Dossett, Jr.
1801 Deposit Guaranty
Bank Building
John H. Downey
611 Barnett Building
William Gerald Duck
914 Poplar Boulevard
Douglas R. Duke
Box 157
Vardaman S. Dunn
Suite 1741 Deposit
Guaranty Bank Building
Bradford J. Dye, Jr.
1948 Cherokee Drive
William Jeff East
4815 North State Street
Woods E. Eastland
Drawer 119
Al D. Eatmon
300 Church Building &
Savings Association Bldg.
Barney Edward Eaton, III
P. O. Box 2448
John Arthur Eaves
Plaza Building

- | | | |
|--|--|---|
| Richard Mack Edmondson
P. O. Box 326 | Earl Ford Fortenberry, Jr.
Mississippi State Senate
New Capitol Building | A. Spencer Gilbert, III
Box 651 |
| W. Edward Ellington
Box 504 | John D. Fournet
P. O. Box 1031 | Karen Annette Gilfoy
3759 Kings Highway |
| Joseph B. Elliott
Box 22527 | John H. Fox, III
Box 22547 | Don A. Gill
P. O. Box 4271 |
| Phil Embry
4851 Maplewood Drive | Lawrence J. Franck
Box 22567 | Judge R. G. Gillespie
New Capitol Building |
| Lura Clark Ethridge
P. O. Box 119 | J. B. Franklin
P. O. Box 12 | Robert G. Gillespie, Jr.
Box 1729 |
| Clyde V. Eubanks
P. O. Box 10087 | Lawrence C. Franklin
Box 444 | Thomas P. Givens
Box 1225 |
| Don Evans
Box 1695 | Kenneth I. Franks
690 First National Bank
Building | Henry Davis Golden
114 Elcrest |
| George Q. Evans
Box 651 | Benjamin Rolling Freeman
Box 1131 | William F. Goodman
P. O. Box 650 |
| William D. Evans
202½ West Capitol | Billy L. Fulgham
831 Madison Street
Apt. K-25 | Paul Roger Googe, Jr.
5115 Shirlwood Drive |
| R. D. Everitt
507 North Park Drive | Gabriel M. Fuqua
Box 1083 | Weaver E. Gore, Jr.
Box 186 |
| Jack H. Ewing
P. O. Box 330 | Louis A. Fuselier
P. O. Box 95 | John G. Gourlay, Jr.
P. O. Box 427 |
| Michael P. Fedorak, Sr.
V A Center Room 119-D | Joe Dewitt Gallaspy
823 Winn Street | William A. Gowan, Jr.
P. O. Box 22547 |
| Bethel Ferguson
Mississippi Power & Light | Sara Edith Gallaspy
823 Winn Street | Dorothy Graham
107 South Farish Street |
| Douglas Mims Ferris
1770 Douglas Drive | Sam Hooper Gammill
812 Gillespie Street | Robert S. Graham
Box 1841 |
| Robert D. Findley
Box 743 | Evelyn Gandy
727 Arlington Street | Brelon E. Grantham, Jr.
Box 1773 |
| Grey Flowers
Box 2022 | James L. Garner, Jr.
1304 Riverwood Drive | R. Gordon Grantham
P. O. Box 119 |
| Henry G. Flowers
P. O. Box 609 | Joseph Bruce Garretty
4561 Meadow Hill Road | Charles L. Graves
185 Thompson Street |
| Howard Curtis Flowers, Jr.
P. O. Box 95 | Charles R. Gear
Box 651 | Elizabeth W. Grayson
P. O. Box 650 |
| W. B. Fontaine
1623 Deposit Guaranty
Bank Building | Arthur G. Gearheard, III
611 Barnett Building | Elmore D. Greaves
P. O. Box 426 |
| Harry Lanier Beach Foote
3601 Terry Road | Martha W. Gerald
P. O. Box 22489 | Garner W. Green, Jr.
Box 1666 |
| Aaron L. Ford
609 Plaza Building | Walter J. Gex, III
P. O. Box 157 | Joshua Green
Box 1666 |
| Cecil A. Ford
Suite 690 First National
Bank Building | Charles E. Gibson, III
690 First National Bank
Building | David Benjamin Grisham
Box 427 |
| James Richard Ford
Box 1288 | P. Olney Gibson, Jr.
Box 743 | John M. Grower
Box 119 |
| Richard Lamar Forman
Box 22567 | | Judge Carl E. Guernsey
Room 215 Courthouse |
| | | Claude W. Guice
4313 Ridgewood Road |

- Lundy R. Gunn
Box 16164
- V. Douglas Gunter
514 Barnett Building
- James Watkins Haddock
Box 220
- Charles C. Hairston
Box 1269
- Carsie A. Hall
121 North Farish Street
- Henderson S. Hall, Jr.
Box 651
- Lowell D. Hamilton
Box 899
- Richard B. Hamilton
1957 Meadowbrook Road
- Robert B. Hamilton
Box 275
- Marshall E. Hanbury
614-616 Barnett Bldg.
- Timmie Hancock
1710 North State
- W. Jeff Hamm
P. O. Box 97
- Bobby Ray Hardin
4443 I-55 North
Box 16188
- Patrick Nicholas
Harkins, III
Box 650
- R. H. Harmon
Box 2368
- Bryan B. Harper, Jr.
Box 22571
- Charles Edward Harper
P. O. Box 727
- Nolan Sidney Harper
P. O. Box 1791
- Alan H. Harrigill
Suite 1120 Bankers
Trust Plaza Bldg.
- David A. Harris
Box 16257
- Herbert F. Harris
4558 Eastwood Road
- William R. Harris
1615 Pine Ridge
- Newt P. Harrison
Box 119
- Robert W. Hartford
P. O. Box 2247
- Robert Eugene Hartzog
939 West Capitol Street
- Robert E. Hauberg
Box 2091
- Ben Hawkins
Box 4714
- George William Haynes
Box 686
- Charles Sills Head
2223 Belvedere Drive
- T. H. Hedgepeth
Box 1467
- Cecil F. Heidelberg, Jr.
690 1st Nat. Bank Bldg.
- Scott P. Hemleben
P. O. Box 22489
- Judge Leon F. Hendrick
Box 1473
- Charles B. Henley
P. O. Box 326
- Jimmy Alexander Henry
1025 Branch Street
- Byron T. Hetrick
Box 1818
- George P. Hewes, III
P. O. Box 119
- L. B. Hilburn
P. O. Box 1793
- J. T. Hill
1363 Belvoir
- Joe W. Hobbs
P. O. Box 650
- E. Clifton Hodge, Jr.
P. O. Box 22567
- David Holderfield
Box 124
- Clarence H. Holland
House of Representatives
New Capital Building
- Richard B. Holmes
P. O. Box 1640
- Hugh S. Hopkins
P. O. Box 1145
- Calvin A. Hopper, Jr.
955 Park Lane
- Frank C. Horton
Box 1084
- Judge W. T. Horton
1001 Monroe Street
- Homer Lee Howie
5360 Interstate 55 No.
- Joseph H. Howie
Box 724
- Theodore G. Huffman
1322 Hazel Street
- Byron William Hughes
940 Bellevue Pl. Apt. 203
- Carson McClain Hughes
Box 961
- Charles E. Hughes
P. O. Box 1666
- John E. Hughes, III
Box 131
- Joe Jack Hurst
P. O. Box 131
- Ellen C. Hutcherson
1338 Linden Place
- H. L. Hutcherson
P. O. Box 1699
- John Reese Hutcherson
Box 119
- Edgar D. Ingels, III
200 Wood Dale Drive
- Cecil E. Inman, Jr.
316 1st Nat. Bank Bldg.
- Judge William H. Inzer
New Capitol
- Ollie Frances Jamison
827 N. State St. Apt. 9-A
- C. J. Jaquith, Jr.
Box 1322
- Samuel N. Jennings
Box 1450
- Fred W. Johnson, Jr.
Box 22628
- Harmel Johnson
1081 Alta Vista Blvd.
- Otis Johnson, Jr.
690 1st Nat. Bank Bldg.
- Willis Howard Johnson, Sr.
3129 Adrienne Drive
- E. Grady Jolly, Jr.
512 East Pearl St.
- Ben Block Jones
P. O. 2511
- Charles O. Neal Jones
4099 Redwind Avenue

- | | | |
|--|--|--|
| Fannie Elizabeth Jones
3615 Hawthorne Drive | Larry Kenneth Krogstad
Box 1084 | Jerome Lee Lohrmann
Box 25 |
| P. Zeb Jones
611 Barnett Building | John Kuykendall
P. O. Box 961 | L. H. Long
1727 St. Ann |
| Judge Robert Lee Jones
New Capitol | Don P. Lacy
Box 22547 | Glenn M. Longino
829 Arlington Street |
| Shirley Norwood Jones
Box 1666 | Heber Austin Ladner, Jr.
Box 220 | Fred J. Lotterhos
P. O. Box 2292 |
| W. Roger Jones
3820 Interstate 55 No. | E. E. Laird, Jr.
P. O. Box 291 | Joseph E. Lotterhos
Deposit Guaranty
Bank Bldg. |
| William Timothy Jones
P. O. Drawer 119 | John W. Land
266 Fredrica | Martha G. Love
433 Louisa Street |
| William F. Jordan
Box 22571 | Ralph L. Landrum
1121 1st Nat. Bank Bldg. | Robert E. Lowry
P. O. Box 2443 |
| John T. Kabbes
P. O. Box 1818 | Roger C. Landrum
Box 22567 | Connie Mack Loyd
3304 Casa Granda |
| Harry Lee Kelley
215 Barnett Building | James Jerry Langford
Box 131 | G. Lowrey Lucas
P. O. Box 25 |
| Jimmy Don Kelly
939 W. Capitol St. | L. Gerald Latham
524 West Hill Drive | Jack H. Lucas
P. O. Box 54 |
| James E. Kemp
2222 Brekinridge Road | William Larry Latham
Box 504 | John M. Lockett
Box 663 |
| Henry M. Kendall
Box 330 | Tommie Christine Layton
4623 Locksley Drive | Warren V. Ludlam, Jr.
Box 427 |
| W. D. Kendall
514 Barnett Building | Catherine Warren Lee
500 First Federal Bldg. | Almond Garry Lumpkin
4120 Carol Street |
| William H. Kessler, Jr.
P. O. Box 12382 | Dan M. Lee
Suite 200 Petroleum Bldg. | John M. Lusk, Jr.
949 Morningside Apt. D-21 |
| Billy Wayne Keyes
245 Valley Vista Dr. | James Larry Lee
1801 Deposit Guaranty
Bank Bldg. | Daniel Eugene Lynn
P. O. Box 2091 |
| Earl Keyes
Box 528 | Claude E. Legate
2926 Meadow Forest Dr. | Oscar P. Mackey
800 State Office Bldg. |
| John Major Kinard
4548 Eastwood Road | Horace Baxter Lester, Jr.
Box 2034 | B. F. Madole
Box 4374 Fondren Sta. |
| Bobbie L. King
130 No. Grandview Circle | Melvyn Rosenman
Leventhal | Joe W. Magee
4537 Office Park Drive |
| Robert W. King
Box 123 | 528½ No. Ferish St. | Frank E. Magill
Box 1972 |
| Curtis G. Kirby
Suite 418 Barnett Bldg. | M. A. Lewis, Jr.
P. O. Box 1353 | A. W. Magruder, Jr.
220 Magruder Building |
| James D. Kirby
Box 3167 | Roland C. Lewis
Box 1695 | Lauch Magruder, Jr.
1801 Deposit Guaranty
Bank Bldg. |
| Lee G. Kirk
5964 Westmore Drive | Thomas G. Lilly
Box 651 | Thomas J. Mallette
1224 Petroleum Building |
| Barbara Ethredge Kirschten
1211 Kenwood Place | John B. Little, Jr.
5404 Red Fox Road | John P. Maloney
P. O. Box 1200 |
| Thomas Kirschten
1211 Kenwood Place | W. Baldwin Lloyd
903 1st Nat. Bank Bldg. | Michael J. Malouf
126 South President St. |
| James P. Knight, Jr.
P. O. Box 161 | Edward P. Lobrano, Jr.
Box 157 | |

- | | | |
|--------------------------|----------------------------|----------------------------|
| Lee Mansell | C. Wallace McGehee, Jr. | Paul O. Miller, III |
| 1331 Kimwood Drive | 754 No. President St. | Shamrock Building |
| C. Geoffrey Mangin | R. B. McGehee, Jr. | William Edward Miller, II |
| 1337 Lynwood Drive | P. O. Box 1954 | P. O. Box 2899 |
| Roland D. Marble | Roger L. McGehee, Jr. | Leonard Milling |
| P. O. Box 131 | 130 Wesley Avenue | Box 1954 |
| E. Michael Marks | Judge M. M. McGowan | Bonnie Mills |
| 214 Bankers Trust Plaza | Circuit Court | 1746 Brecon Street |
| Charles A. Marx | James Grant McIntyre | Claude Milstead |
| P. O. Box 958 | 417 Barnett Building | 1305 Woodcrest Dr. |
| Herman Milton Mason | James McKay | Cecil M. Mitchell |
| 5941 Whitstone Road | 5430 Meadow Oak Pk. Dr. | 165 Bristol Blvd. |
| J. Morton Matrick | M. Curtiss McKee | Milton H. Mitchell |
| 1123 Garden Park Drive | P. O. Box 651 | P. O. Box 2216 |
| John L. Maxey | Curtis W. McKewen | E. W. Montgomery, II |
| Box 22571 | 1103 Alta Vista Blvd. | Box 724 |
| James Dent May | Dale H. McKibben | Hugh C. Montgomery, Jr. |
| Box 2216 | 3820 Interstate 55 North | 1801 Deposit Guaranty |
| M. Charles May | William E. McKinley | Bank Bldg. |
| Box 1704 | 2073 Shady Lane Drive | Lloyd M. Montgomery, Jr. |
| Rose P. May | Martin McLendon | 660 Forest Avenue |
| 540 Woodbury Road | Box 220 | Malcolm B. Montgomery |
| Walter Dent May | Clyde A. McLeod | P. O. Box 1288 |
| P. O. Box 42 | Box 1849 | Samuel A. Montgomery |
| Velia Ann Mayer | James N. McLeod | Magnolia Towers |
| Box 650 | 621 Eagle Avenue | Gid Montjoy, IV |
| Charles R. Mayfield, Jr. | Harry McMain | Box 724 |
| 205 Church Building | P. O. Box 3467 | Charles O. Moore |
| Robert Travis McAdory | David M. McMullan | Box 16125 |
| P. O. Box 2599 | P. O. Box 427 | E. Don Moore |
| Robert C. McAllister | Orland Murry McNeely | Box 10087 Northside Sta. |
| Box 2005 | 930 Deposit Guaranty | Frank T. Moore, Jr. |
| B. B. McClendon | Bank Bldg. | Box 22489 |
| 903 Deposit Guaranty | Jack F. McPeak | Judge Russel D. Moore, III |
| Bank Bldg. | P. O. Box 1972 | P. O. Box 171 |
| B. B. McClendon, Jr. | Robert Rex McRaney | Stephen Owen Moore |
| 903 Deposit Guaranty | 360 Cummins Street | First National Bank Bldg. |
| Bank Bldg. | C. Eugene McRoberts, Jr. | William S. Moore |
| George T. McClintock | Box 22567 | 514 Barnett Building |
| P. O. Box 1288 | George D. Meek | Donald Morrison |
| Jaffa W. McCraney | 619 Mohawk Avenue | P. O. Box 22628 |
| 5518 Concord Drive | Charles Walter Middlebrook | Dan W. Morse |
| Dan McCallun | Box 1972 | 604 Bankers Trust |
| Box 22567 | George O. Miles | Plaza Bldg. |
| John L. McDavid | 518 East Capitol Street | W. E. Morse |
| P. O. Box 326 | Harold D. Miller, Jr. | 601 Bankers Trust |
| Sara Ann McDavid | Box 22567 | Plaza Bldg. |
| Box 1467 | Jimmy Lynn Miller | Henry H. Mounger |
| Cleve McDowell | 113 Millsaps Plaza | P. O. Box 1821 |
| 2724 Queen Road | | |

- William H. Mounger, Jr.
P. O. Box 1651
- Jean Denman Muirhead
Box 8742
- Adrian E. Mullen
1746 Hillview Drive
- Thomas Earl Mullen
P. O. Box 2026
- Peggy G. Mullins
644 Benning Road
- Thomas M. Murphree, Jr.
4205 Brookdale
- John Herr Musser, IV
327 Briarwood Drive
- Eric G. Myers, Jr.
Box 6882
- James Houston Neal, Sr.
1954 Camellia Lane
- James H. Neeld, III
P. O. Box 2960
- William H. Neely
P. O. Box 78
- William T. Neely
P. O. Box 17
- Frank Pemberton Nelson
Box 1972
- Hugo Newcomb
New Capitol Building
- Hugo Newcomb, Jr.
Box 3728
- James W. Newman, III
328 1st Nat. Bank Bldg.
- John A. Nichols
Drawer 290
- Robert G. Nichols, Jr.
Box 1526
- Samuel J. Nicholas, Jr.
1650 Robert Drive
- Wayne L. Nix
P. O. Box 291
- Ed Davis Noble, Jr.
Box 220
- Henry Russell Nobles
Box 1012
- James W. Nobles
Box 1288
- J. T. Noblin
Box 4452
- W. C. Noblin
Box 2186
- David H. Nutt
Drawer 1532
- James W. O'Mara
Box 22567
- Junior O'Mara
P. O. Box 22567
- John Mack Osborne, Jr.
724 Chickasaw
- Emile C. Ott
P. O. Box 95
- N. W. Overstreet, Jr.
P. O. Box 961
- Harry Dale Owen
Box 175
- Oran Charles Page
Box 22571
- Derek Parker
Box 1176
- Jack S. Paker
220 Edgewood Terrace
Apt. G-26
- Richard Wayne Parker
Box 16111 McWillie Sta.
- Mackie Paschal
1047 Sylvian Street
- Billy Wayne Patridge
206 Stewart Circle
- Judge J. Neville Patterson
New Capitol Building
- William N. Patterson
6254 Mossline Drive
- W. R. Patterson
626 Newland Street
- Marry Libby Payne
110 New Capitol Bldg.
- Thomas B. Payne
4801 No. State St.
- James A. Peden, Jr.
Box 673
- Charles Pendelton
Box 427
- John L. Penny
313 Wacaster
- Kenneth Giles Perry
Box 157
- Robert Perry
Box 22628
- James Brady Persons
1801 Deposit Guaranty
Bank Bldg.
- Edward J. Peters
Box 864
- M. J. Peterson
Box 727
- Ellen L. Pfister
Box 521
- C. Alton Phillips
Box 427
- Rubel L. Phillips
P. O. Box 22628
- James A. Phyfer
501 East Pearl St.
- George B. Pickett, Jr.
Box 59
- W. W. Pierce
300 Shamrock Bldg.
- Bob W. Pittman
P. O. Box 1849
- John R. Poole
513 Plaza Building
- Barry H. Powell
Box 22571
- Gilbert Bailey Powell
P. O. Box 8153
- Roy D. Powell
Box 22493
- Thomas W. Prewitt
Box 22567
- John H. Price, Jr.
P. O. Drawer 1532
- Murry Price
4226 Fairfax Avenue
- Thomas Bennett Price
126 South President
- Robert A. Pritchard
300 Shamrock Building
- Fred H. Purser, Jr.
821 Timberlain Drive
- John M. Putnam
P. O. Box 2075
- L. Arnold Pyle
Box 427
- William A. Pyle
Box 427
- Dixon Pyles
507½ East Pearl
- Charles P. Quarterman
139 Highland Circle
- John D. Quarles
935 Branch Street

- Charles Henry Ramberg
147 Queen Andria Drive
James E. Rankin
5416 Sedgwick Drive
Robert D. Ray
Suite 200 Petroleum Bldg.
Woodrow W. Reagan
1316 Kimwood Drive
William C. Reed, Jr.
Magnolia Towers
Jimmie B. Reynolds, Jr.
P. O. Box 651
Thomas Henry Rhoden
Drawer 119
Donald K. Richards
1503 Wilhurst Street
Richard M. Richardson, Jr.
750 Poplar Boulevard
Charles C. Richmond
2601 Lake Circle Drive
Bernard L. Riddick
145 Catalina Circle
C. R. Ridgway
Box 187
Louis E. Ridgway, Jr.
P. O. Box 187
William B. Ridgway
Box 187
Stephen W. Rimmer
F-1 Pines Apt.
5026 Witkins Drive
A. H. Ritter, Jr.
P. O. Box 1200
Jack L. Ritter
P. O. Box 701
John M. Roach
P. O. Box 1084
W. E. Robbins
5058 Old Canton Road
Frederick F. Roberts, Jr.
1431 Canton Mart Road
Nolle T. Roberts
309 Barnett Building
Frank A. Robertson
P. O. Box 95
Judge Stokes V. Robertson,
Jr.
New Capitol Building
Sidney A. Robinson, Jr.
Box 10917
- Stuart Robinson
Suite 1120 Bankers Trust
Plaza Bldg.
Guy N. Rogers
Box 220
Judge Henry Lee Rodgers
New Capitol
Harry J. Rosenthal
3227 Crafton Street
Fred A. Ross, Sr.
P. O. Box 4321
Fondren Station
Fred A. Ross, Jr.
514 Barnett Building
Howard C. Ross, Jr.
Box 845
Abe A. Rotwein
P. O. Box 22582
Thomas E. Royals
Suite 717 Deposit
Guaranty Bank Bldg.
Fred T. Rucker, III
P. O. Box 1176
Glenn M. Russum
Suite 602
Barnett Building
Darold L. Rutland
Box 862
David Sadler
Box 9634 Northside Sta.
Natale A. Salvo
P. O. Box 4593
Thomas W. Sanford
P. O. Box 22493
Charles William Satterfield
5383 Keele
Clarence R. Scales
Box 1176
Jeanne D. Scales
1107 Deposit Guaranty
Bank Bldg.
Jewelle Scales
2021½ West Capitol
Patrick Hugh Scanlon
930 Deposit Guaranty
Bank Bldg.
Ripley Pope Schoenberger
1230 Monroe Street
E. G. Scott
Box 1818
- Frank T. Scott
729 Fairview Street
Sam E. Scott
690 1st Nat. Bank Bldg.
Tom B. Scott, Jr.
P. O. Box 1818
Clanton J. M. Seay
3975 I-55 North Apt. N-4
Thomas L. Segrest
4750 Christian Drive 10 A
William F. Selph, Jr.
P. O. Box 1567
Robert Bradshaw Sessums
930 Deposit Guaranty
National Bank Building
Dugas Shands
Suite 1121-23
1st National Bank Bldg.
John A. Shanks
4635 Hazlewood Drive
W. L. Shappley
4801 North State Street
Suite 207
George E. Shaw, Jr.
P. O. Box 289
A. Jerry Sheldon
Box 22489
Dan H. Shell
Box 157
Ernest L. Shelton
712 Plaza Building
Leon Shelton
221 No. President St.
N. R. Shoemaker
P. O. Box 1954
Walter L. Shows
P. O. Box 2355
Eugene A. Simmons
Box 158
J. E. Skinner
839 Deposit Guaranty
National Bank Bldg.
Constance Iona Slaughter
233 No. Farish St.
Bennett E. Smith
1105 Woolfolk Building
Conner D. Smith
1945 Camelia Lane
Davis Hall Smith
904 Lakeland Dr. Apt. D-4

- Howard Neal Smith
Box 9532
- Judge L. A. Smith, Jr.
New Capitol Building
- Lamuel A. Smith, III
Apt. A 27
947 Morningside Street
- L. O. Smith, Jr.
P. O. Box 15
- Stone M. Smith
P. O. Box 1729
- Timothy R. Smith
Drawer 2470
- William C. Smith
P. O. Drawer 2428
- Hugh Bowman Sneed, Jr.
3069 Fleetwood Drive
- Wayne Snuggs
1121 Ridgewood
- James Ralph Sowell, Jr.
Box 3162
- James L. Spencer
523 Plaza Building
- Larry Spencer
Suite 100 Professional
Bldg.
- Lawrence Morris Spivey
Box 5343
- Tatum R. Stacey
Box 431
- Charles Stephen Stack
Apt. I 25 Edgewood
Terrace Apts.
- Herbert Glenn Stampley
3107 Shirley Drive
- Percy Stanfield, Jr.
1201 Bankers Trust
Plaza Building
- Thomas I. Starling
Box 22628
- Horace Steele
Box 731
- Jerome B. Steen
P. O. Box 651
- Kenneth Keith Steiner, Jr.
19 N. Hill Pkwy Apt. 19N
- E. W. Stennett
P. O. Box 673
- Judge J. C. Stennett
Box 868
- John H. Stennis
Box 427
- Joseph Taylor Stephens
Deposit Guaranty
National Bank Bldg.
- Lowell F. Stephens
Box 1200
- Phineas Stevens
Box 22567
- Nausead L. Stewart
P. O. Box 290
- Pernila Jane Stimley
2311 Queensroad Ave.
- Robert N. Stockett, Jr.
1045 High Street
- John E. Stone
4212 Brookdale
- R. B. Stovall
1621 Peachtree Street
- Harry C. Strauss
Box 651
- F. Kent Stribling
Box 1793
- Roger W. Stribling, Jr.
2259 East Manor Dr.
- A. C. Stringer
1463 Meadowbrook Rd.
- Quentin Stringer
1807 Ridgeover Place
- Forrest W. Stringfellow
416 Glen Rose Drive
- D. R. Stump
4115 Hawthorne Drive
- W. E. Suddath, Jr.
P. O. Box 650
- Charles M. Sudduth
4104 Del Rosa Drive
- Judge R. P. Sugg
Box 117
- Andrew Sullivan
3400 West Capitol
- John C. Sullivan
P. O. Box 528
- John C. Sullivan, Jr.
P. O. Box 528
- Floyd M. Sulser, Jr.
240 Carmel Avenue
- A. F. Summer
P. O. Box 220
- Minor C. Summers, Jr.
Box 961
- Valentine Surgis
Box 17
- William H. Sutherland, Jr.
715 Kirkley Drive
- Thomas Henry Suttle, Jr.
Box 1084
- George Mitchell Swindoll
1620 Winchester Street
- Robert Edward Swindoll
1449 Morson Road
- Thomas M. Tann
Box 1505
- Anthony A. Tattis
Box 235
- Austin Leroy Taylor, Jr.
1420 School Park
- Cullen Conerly Taylor
4684 Nisqually
- Ernest G. Taylor, Jr.
Box 427
- John S. Taylor, Jr.
1932 Bellewood Road
- O. B. Taylor, Jr.
P. O. Drawer 2428
- Rowan H. Taylor
P. O. Drawer 2428
- Swep S. Taylor, Jr.
P. O. Box 912
- Scott Tennyson
Suite 1829 Deposit
Guaranty Bank Bldg.
- Emmett Grant Thorpe
Box 25
- William Patrick Thomas
1216 Wooddell Drive
- Allen C. Thompson
810 Fairview
- Clifford C. Thompson
518 Benning Road
- Fulton Thompson
P. O. Box 410
- Helene L. Thompson
Box 119
- Luther Moorman
Thompson
690 1st Nat. Bank Bldg.
- Robert H. Thompson
P. O. Box 410

- Collis M. Thornell
365 Frances
- Bernard L. Tighe
416 Plaza Building
- Bowman Stirling Tighe
416 Plaza Building
- John E. Tracy
P. O. Box 5013
Fondren Station
- Robert C. Trainor
P. O. Box 4973
- Frank W. Trapp
160 River Park Drive
- John A. Travis, Jr.
Box 807
- John A. Travis, III
P. O. Box 22567
- L. K. Travis
4632 N. State St.
- Robert C. Travis
P. O. Box 651
- John B. Traylor
P. O. Box 5005
- Betty Barteel Tucker
507½ East Pearl St.
- Davey Tucker
Box 1261
- Eddie Howard Tucker
121 N. Farish St.
- James B. Tucker
Box 1261
- Samuel L. Tucker
530 Pennsylvania Avenue
- Luther B. Turbeville
Box 291
- Felix J. Underwood, Jr.
4308 Manhattan Road
- John C. Underwood, Jr.
1835 Parkridge Drive
- Robert W. Upchurch
2623 Clinton Avenue
- George Huddleston
Van Zant
Box 1032
- Harlon H. Varnado
Suite 1250 Petroleum
Bldg.
- Robert B. Vickery
Box 2216
- Lynn Douglas Wade
501 East Pearl
- Guy Morrison Walker
Box 244
- Randall B. Wall
Box 427
- James A. Wallace
1201 Bankers Trust
Plaza Bldg.
- Laura S. Wallace
1841 Parkridge Drive
- Bill Waller
Box 22547
- Ben H. Walley
800 State Office Building
- Charles W. Walton
Box 3271
- O. B. Walton, Jr.
1600 Eastover Drive
- Clell G. Ward
1328 Lynch Street
- Erwin C. Ward
Box 673
- Michael Hailey Ward
850 North Jefferson
Apt. L-22
- Howard S. Warner, II
Suite 328
1st National Bank Bldg.
- H. V. Watkins
Box 427
- Thomas H. Watkins
P. O. Box 650
- Louis H. Watson
1436 Amherst
- Walker L. Watters
P. O. Box 22489
- Robert H. Weaver
P. O. Box 427
- David Thomas Webb, Jr.
222 N. President St.
- Thomas Audrey Webb
529 Witsell Road
- William Samuel Weems
85 N. Hill Parkway
Apt. 6K
- W. Scott Welch, III
Box 22567
- Calvin L. Wells
P. O. Box 22489
- Erskine W. Wells
P. O. Box 131
- W. Calvin Wells
P. O. Box 22489
- W. Calvin Bill Wells, Jr.
P. O. Box 131
- John A. Welsch, Jr.
P. O. Box 119
- Carol Catherine West
1207 Linden Place
- John M. Weston
Box 1818
- Charles R. White
140 West Pearl
- John Harold White, Jr.
140 West Pearl
- Thomas Eugene White
227 Wesley Avenue
- D. Jene Whitecotton
Apt. 13C Normandy
13 North Hills Parkway
- Hassell Hendon Whitworth
P. O. Box 650
- Yandell Wideman
235 East Capitol Street
- Samuel H. Wilkins
Box 504
- Gene A. Wilkinson
P. O. Box 673
- Michael C. Wilkinson
P. O. Box 4932
Fondren Station
- Frank T. Williams
Box 157
- W. R. Willis
P. O. Box 1262
- Earl R. Wilson
901 1st Nat. Bank Bldg.
- James M. Wilson
Box 8487
- Lewis Hugh Wilson, III
911 Pinehurst
- Richard Baxter Wilson, Jr.
P. O. Box 651
- William F. Winter
P. O. Box 427
- Sherwood W. Wise
Box 651
- Larry W. Wood
310 Southbrook Drive

W. Wayne Wood
5952 Waverly Drive
George F. Woodliff
690 1st Nat. Bank Bldg.
Thomas H. Woodrow
4929 Clinton Boulevard
Roy Houston Woody, III
275 Roseneath
Charles S. Wright
P. O. Box 2201
W. Swan Yerger
690 1st Nat. Bank Bldg.
Rice P. York
Box 22511
Frances M. Young
P. O. Box 263
Jack H. Young
Box 3543
Jack H. Young, Jr.
3760 Brinkley Drive
James Leon Young
930 Deposit Guaranty
Bank Bldg.
J. Will Young
930 Deposit Guaranty
National Bank Bldg.
Robert James Young
1802 Howard
Frank M. Youngblood
Box 1567
Thomas Lee Zebert
404 North Biederman
Road Pearl
John B. Zuccaro
3344 Santa Rosa Street

JONESTOWN

M. M. Butler
Box 187

KOSCIUSKO

John Percy Allen
300 N. Jackson St.
William D. Brooks
105-07 S. Madison St.
David E. Crawley, Jr.
Crawley Building
George Lee Dorrill
Box 101
William Reynolds Ford
Crawley Building

D. H. Glass
P. O. Box 746
John D. Guyton
105-07 South Madison St.
Chatwin M. Jackson, Jr.
Box 27
John C. Love, Sr.
P. O. Box 527
John C. Love, Jr.
P. O. Box 527
Alton Massey
Box 189
Ray S. Mikell
P. O. Box 658
Clarence E. Morgan, Jr.
Box 721
Clarence E. Morgan, III
108 East Washington St.
Hugh Swinton Potts, Jr.
Box 637
John E. Shaw
112 Cedar Lane Drive
William W. Smith
Box 176
G. J. Thornton
Morgan & Lindsay Bldg.
Harold W. Williams
517 Lucas Street
Claude Jackson Woodward
Doty Building

LAKE**CORMORANT**

Isaiah Madison
General Delivery

LAMBERT

Walter E. Dreaden, Jr.
P. O. Box 215
Thomas Sharp
Hoke Stone

LAUREL

E. R. Alley
Box 2744
Ray D. Baldwin
3815 Baldwin Drive
Woodrow W. Barham, Jr.
720 26th Street
E. C. Bonney
P. O. Box 957

H. Harvey Breazeale
2018 Briarwood Drive
Ronald C. Brown
Box 171
Kenneth Bullock
Box 2008
John A. Bruce Caldwell
P. O. Box 362
J. Edwin Campbell
Box 584
Lunsford Casey
P. O. Box 185
Leonard B. Caves
28 Northgate
Fledell Chain
48 Oakcrest Drive
Thomas Gene Clark
P. O. Box 731
Elson K. Collins
Box 732
Edwin P. Connolly
P. O. Box 525
Billy M. Davis
Route 3, Box 545
Henry S. Davis, Jr.
P. O. Box 1137
William M. Deavours
P. O. Box 106
W. O. Dillard
P. O. Box 286
Michael Thomas Elias
Box 2008
Sarah L. Entrekina
768 Northwood Drive
E. Brooke Ferris, III
Gardiner Center Offices
Carl Dexter Ford
Room 303 Wallace Bldg.
C. Denton Gibbes, Jr.
Box 2008 Choctaw Sta.
Stewart J. Gilchrist
P. O. Box 106
Ernest W. Graves
Box 2008 Choctaw Sta.
Matthew Harper, Jr.
P. O. Box 726
James D. Hester
Box 713
Thomas J. Holifield
Box 726

W. Major Holifield
P. O. Box 901
Jones H. Hoskins
Box 841
John Leonard Jeffries
P. O. Box 844
Harry E. Koch
P. O. Box 2455
David H. Massey
311 N. Fifth Avenue
George D. Maxey
P. O. Box 731
Franklin Cooper
McKenzie, Jr.
Box 42
Apheus Holland McRae
Box 65
Harold W. Melvin
Box 142
Leonard B. Melvin, Sr.
Box 142
Leonard B. Melvin, Jr.
Box 142
Judge Goode Montgomery,
Jr.
P. O. Drawer 5
Humphrey C. Moynihan
Box 222
William S. Mullins, III
P. O. Box 2008
Choctaw Station
William Harold Odom
Box 354
L. A. Pacific
P. O. Box 1860
Samuel V. Pack
P. O. Box 706
Charles W. Pickering
P. O. Box 713
L. Percy Quinn
Box 1085
Kalford C. Ratcliff
P. O. Box 706
Robert Lamar Rogers, Jr.
Box 2008
Quitman Ross
P. O. Box 464
A. S. Scott, Sr.
P. O. Box 403

A. S. Scott, Jr.
P. O. Box 403
Donald Allen Smith
Box 1492
Philip E. Stevens
Box 434
J. Robert Sullivan, Sr.
Box 1131
William B. Sullivan
Box 41
William W. Sumrall
Box 726
Jon A. Swartzfager
P. O. Box 121
Paul G. Swartzfager
Box 121
Raymond C. Swartzfager, Jr.
P. O. Box 65
Lowell W. Tew
Box 732
C. H. Walker
Box 762
Guy M. Walker
Box 41
J. Larry Walters
Box 713
Milton B. Weems
Box 106
Raynold Lee Willett
Box 305

LEAKESVILLE

Curtis Breland
P. O. Box 706
T. Horton Hillman
Box 555

LELAND

Edward Joshua Bogan, Jr.
Broad Street
Robert E. Hilton
310 4th Street
William B. Waits
P. O. Box 128
Burrell O. McGee
209 Broad Street
John C. Webb
P. O. Drawer 392

LEXINGTON

John William Barrett
Box 149

Pat M. Barrett
P. O. Box 149
Pat M. Barrett, Jr.
P. O. Box 149
J. R. Gilfoy
P. O. Drawer 30
William L. Jordan
Box 415
G. H. McMorrough
Edwin Tye Neilson
Box 448
Marshall H. Smith
H. Edwin White
Box 179

LIBERTY

T. F. Badon
P. O. Box 353
Mary Jo Poole Forman
P. O. Drawer L
Joe D. Gordon, Sr.
P. O. Box 268
Joseph D. Gordon, Jr.
P. O. Box 268
Kenneth Gordon
Box 373
F. W. Stratton
P. O. Box D

LONG BEACH

Albert E. Easterling, Jr.
123 Buena Vista Drive
Robert Oliver Homes, Jr.
101 Lang Avenue
James M. Maxwell, Jr.
400 Gulfview Avenue
Herbert J. Stelly, Sr.
900 West Old Pass Road

LOUISVILLE

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Box 560
R. W. Boydston, Jr.
Box 560
David E. Crawley, III
P. O. Box 543
Frank M. Deramus
Box 31
Grady Jyles Eaves
114 South Columbus Ave.
Charles D. Fair
P. O. Box 509

Terry M. Haimes
J. Hoy Hathorn
Masonic Building
James Cal Mayo
P. O. Box 509
Edward C. Prisock
Masonic Building
Neal Prisock

Masonic Building
Burris Olen Smith
P. O. Box 31
Gene Stringer
P. O. Box 328
David T. Wilson, Jr.
108 South Columbus Ave.
Henry C. Wood

LUCEDALE

James W. Backstrom
Box 713
Sidney A. Barnett
303 Summer Street
John Laverne Dale
P. O. Box 67
H. M. Hunter
Box 134
Darryl A. Hurt
P. O. Box 45
Maurice L. Malone
P. O. Box 208
Judge Darwin M. Maples
Box 75
J. O. Moss
P. O. Box 572
Andrew M. N. Murphy
Box 585
Williams S. Murphy
William Avery Wilkerson
Box 255

LUMBERTON

Michael R. Eubanks
P. O. Box 527
Bobby J. Garraway
Box 335
Joseph H. Montgomery
P. O. Box 392

LYMAN

Upton Sisson
P. O. Box 284

MACON

E. H. Britton
Ernest L. Brown
500 Jefferson Street
Leroy R. Kenneday
Jefferson Street
Charles G. Perkins
314 Wayne Street

MADISON

H. S. Owens
P. O. Box 7

MAGEE

T. M. Bishop
Box 623
L. R. Floyd
RFD 2 Box 122
Willis T. Matthews
103 Bankers Trust Bldg.
George Donald Runnels
113 N.W. First Street

MAGNOLIA

Judge Thad Leggett, III
P. O. Box 307
O. W. Phillips
225 East Bay Street
William Benjamin Regan
225 East Bay Street
B. D. Statham
110 N. Cherry St.
William F. Watkins
101 N. Cherry St.

MARKS

Ben M. Caldwell
P. O. Box 370
Partee L. Denton
331 Locust Street
Ellen E. Goldman
231 Chestnut
Ney M. Gore, Jr.
337 First Street
T. N. Gore
T. N. Gore, Jr.
301 Locust Street
Mose E. Kincaid
805 Third
Lomax Lamb, Jr.
Larry O'Keefe Lewis
Box 370

Eugene Thompson
P. O. Box 66

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Will P. Starnes
P. O. Box 33

McCOMB

Louis Alford
P. O. Box 489
Clinton Ashley Atkinson
P. O. Box 155
Robert W. Brumfield
P. O. Box 886
Charles Wayne Dowdy
Box 853
John B. Ewing
P. O. Box 428
Norman B. Gillis, Jr.
P. O. Drawer G
William S. Guy
P. O. Box 853
Judge Bert H. Jones
L. S. McClaren
324 New York Avenue
Dale Henry McDairtt
653 Nebraska Avenue
Gerald M. McMillan
P. O. Box 73
George Terrell Morgan
Box 998
Joe N. Pigott
Drawer P
Clyde Ratcliff
Box 81
R. B. Reeves
212 3rd Street
Robert S. Reeves
212 Third Street
J. Gordon Roach
Box 967
John Gordon Roach, Jr.
P. O. Box 506
Hansford L. Simmons
509 Caston
Drennen Michael Smith
P. O. Box 592
Wayne L. Sterling
Box 592
Laverne A. Varnado
P. O. Box 959

Thomas H. Walman
111 N. Front St.
John H. White, Jr.
P. O. Box 672
William A. Wiltshire
P. O. Drawer 527

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L. L. Forman
K. Maxwell Graves, Jr.
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W. Wilson Hewitt
M. Bradley Lawrence
Nolan M. McCoy
Box 265
H. B. Mayes McGehee
P. O. Box 188
Judge James A. Torrey
James A. Torrey, Jr.
P. O. Box 188
Sanfred P. Torrey
P. O. Box 227

MENDENHALL

Thomas B. Alexander
Ras Milton Boyles
P. O. Box 576
Travis Hilton Bryant
122 Court Street
Grover C. Coleman
P. O. Box 402
A. K. Edwards
Box 66
Judge George B. Grubbs
Box 217
Isom C. Harrington
P. O. Box 181
Douglas M. Magee
Box 231
Aleita M. Sullivan
Box 575
Thomas H. Sullivan, Jr.
Box 37
Judge J. W. Walker
Connie S. Whitfield
127 South Main Street
George G. Williamson
Box 687

MERIDIAN

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208 Lamar Building

Gerald Adams
Box 849
George W. Allen
Box 367
Brad B. Bailey
2314 17th Street
Robert Walter Bailey
509 21st Avenue
L. D. Beard
207-09 Lamar Building
Thomas D. Bourdeaux
Box 2009
Maxie Gene Brown
P. O. Box 305
Frank J. Buchanan
4257 Poplar Springs Dr.
F. Gerald Burnett
324 Citizens Nat. Bk. Bldg.
Joe G. Byrd
2810 - 7th Street, Apt. 8
Overton W. Cameron
Box 888
Robert D. Coit
P. O. Box 424
William Bond Compton
Box 845
Alfred E. Corey
P. O. Box 1413
Lyle V. Corey
Box 1413
J. Michael Corrigan, Jr.
413 Greater Miss. Life
Billy R. Covington
P. O. Box 1904
J. A. Covington
P. O. Box 786
Dal M. Crenshaw
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Loan Bldg.
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Thomas W. Dawson
Box 2009
Robert B. Deen, Jr.
Box 888
Aubert C. Dunn
P. O. Box 1745
Edwin A. Dunn
P. O. Box 1745

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1000 20th Avenue
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Box 804
Wingfield Glover, Jr.
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Box 1625
Thomas L. Goldman
Box 1625
Thomas W. Goldman, Jr.
Box 1625
Hardy P. Graham
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William J. Gunn, Jr.
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Box 5376
Joe Clay Hamilton
Box 5376
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Thomas M. Hendricks, Jr.
P. O. Box 1501
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402 25th Avenue
Thomas K. Holyfield
325 Lamar Bldg. Box 1928
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Philip D. Hughes
Box 1468
Alvis C. Johnson
Box 824
Granville Jones
Box 1562
Harris W. Sonny Jones, Jr.
Box 725
S. B. T. Jones
Box 5028

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Jerry Gordon Mason
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Suit 426
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903 31st Avenue
Paul Mains Neville
Box 5376
Judge William Deb Neville
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Harold Noe
Box 2009
Joe R. Odom
P. O. Box 607
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Howard R. Pigford
P. O. Box 1501
Claude L. Pitts
300 Rosenbaum Building
James Nicholas Potuk
3409 35th Avenue
John Leslie Prichard
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Lawrence W. Rabb
907 Greater Mississippi
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Fred M. Rogers
1823 34th Street
Margaret E. Rogers
2612 19th Street
James Edgar Sandusky
Box 1754
Daniel P. Self, Jr.
Box 949

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212 Lamar Building
James T. Singley
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Box 786
James T. Speed
Box 5355
W. Arlo Temple
Box 786
Robert L. Tinsley, Jr.
Box 1327
Thomas R. Ward
P. O. Box 3007
George D. Warner, Jr.
Box 5633
Judge Homer C. Watkins
Box 1952
Thomas K. Watts
Box 786
Q. Earl Webb
411 Greater Mississippi
Life Bldg.
J. C. Wilbourn
Box 1389
Richard E. Wilbourn, II
P. O. Box 1389
J. Pat Wiley
Box 504
James D. Williams
Box 1389
Marvin Williams
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Loan Bldg.
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Judge Lester F. Williamson
P. O. Box 1501
N. S. Williamson
Box 86
Gibson B. Witherspoon
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Ralph E. Young
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Jack A. Morris
P. O. Drawer C
Robert Glenn Turnage
Box 325
Francis M. Vining
Box 250

MOORHEAD

Ben Himelstein

MORTON

James Thomas Farris
Drawer K

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Box 356
Robert T. Mills
P. O. Box 706
Richard E. Perkins, Jr.
Box 706

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Atticus A. Calhoun
Box 297

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Edwin E. Benoist, Jr.
P. O. Box 913
Frederick C. Berger
P. O. Box 1144
Judge Robert A. Bonds, Jr.
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David C. Bramlette
P. O. Box 1307
James M. Brandon
P. O. Box 1344
J. Walter Brown, Jr.
P. O. Box 1047
B. C. Callon
P. O. Box 640
Judge Curtis L. Collins

E. H. Fitzpatrick, Jr.
Box 226
Brent Forman
Box 1307
W. A. Geisenberger
Suite 7 Fry Building
John T. Green
110 South Wall Street
Thomas K. Green, Jr.
123 S. Commerce St.
Lucien C. Gwin, Jr.
Box 375
Lucien G. Gwin
Box 1384
G. Stuart Handy
P. O. Drawer 1344
Graham H. Hicks
Box 364
Oliver M. Hornsby
118 Fry Building
Eunice V. Johnson
P. O. Box 1322
Forrest A. Johnson
P. O. Box 1322
James H. Keyer
Lomond Building
Robert D. Lee
133 South Commerce
Anabel Y. Maxie
1016 Main Street
Thomas M. McNeely, Jr.
116 South Wall Street
Herman Bradford Miller,
Jr.
8 Beechwood Lane
Keith Wayne Morton
P. O. Box 245
John E. Mulhean, Jr.
202 S. Wall St.
Clyde W. Mullins
133 South Cinnerce St.
Robert L. Netterville
Box 946
Daniel J. Obeirne
P. O. Drawer 1344
Thomas J. Obeirne
Box 330
C. F. Patterson
506 South Union Street

Claude Pintard, Jr.
P. O. Box 1047
Jack E. Pool
202 S. Wall St.
William F. Riely
P. O. Box 174
Harry L. Rosenthal
325 Main Street
J. Fred Schmidt, Jr.
304 Auburn Avenue
S. Barnett Serio, Jr.
Box 1207
Cecil Gill Smith, Jr.
133 South Commerce St.
William Marion Smith
Box 1307
Stanley Leroy Taylor, Jr.
115 S. Pearl St.
John Merritt Tipton
Fry Building
E. G. Truly
Box 1307
Frank W. Walden
Box 345
Edwin C. Ward
Box 1307
Calvin B. Wells
Fry Building
George Ferdinand West, Jr.
Box 1202
Robert Y. Wood, Jr.
Box 1047
Clarence N. Young
Box 1407
Leonard Albert Young
55 Seargent Prentiss Dr.
Joseph S. Zuccaro
Box 1047

NESBIT

Lee Virden Hamberlin
Route 1, Box 505

NEW ALBANY

J. E. Boone
Box 973
Hugh N. Clayton
Box 157
William G. Collins
Route 4
Tom Leslie Darden

Henry H. King
Box 184
Baxter N. Knox, Jr.
P. O. Box 336
Talmadge D. Littlejohn
Box 869
W. Lester McDonough
P. O. Box 186
John David Pennebaker
Box 96
William O. Rutledge, III
Route 4
Edgar J. Stephens, Jr.
P. O. Box 330
Lester F. Sumners
P. O. Box 123
Joseph T. Wilkins, III
Box 973

NEW AUGUSTA

John M. Dunnam, Jr.
Box 138

NEW HEBRON

Eugene Sexton Berry, Jr.
Box 111

NEWTON

D. M. Anderson
Box 7
Jack W. Brand
Box 380
W. A. Byrd
102 Byrd Street
R. S. Majure
Box 220
George S. Monroe
Box 28
Edmund J. Phillips, Jr.
Box 178
S. T. Roebuck
104 North Main Street

NORTH CARROLLTON

W. C. Neill
Peoples Bank & Trust Co.

OCEAN SPRINGS

B. O. Bailey, Jr.
Box 552
John R. Blossman
206 Shearwater Dr.

Lynden Bowring
207 Pershing Avenue
Judge L. C. Corban
P. O. Box 547
A. Y. Harper
P. O. Box 712
John L. Heiss, Jr.
Box 221
Oscar R. Jordan
914 Washington Avenue
George R. Lewis
Box 895
James R. Lockard
Route 1, Box 91
Russell Moran
P. O. Drawer AA
George S. Neal, Jr.
Box 901
Schuyler Poitevent, Jr.
James Russell Reed, Jr.
P. O. Box 836
S. B. Watkins
Route 3, Box 362-D
James Webster Wilson
1 Bay Sweep Circle

OKOLONA

Kenneth M. Burns
Box 309
Robert K. Coleman
H. L. Morrison
Walter M. Obarr
P. O. Box 309
John D. Sibley
Main Street

OLIVE BRANCH

Drue Birmingham, Jr.
Billy Don Hall
7155 Lamar Avenue

OVETT

John H. Shows
Route 1

OXFORD

Vettra Glen Alderson
P. O. Box 345
Robert Owen Allen
515 North 11th
Gordon Edward Baird
313 Van Buren

Dwight N. Ball
Box 566
Russell Blair
204 First National
Bank Bldg.
William Francis Bullock, Jr.
313 Washington Ave.
Extended
Richard Lamar Carlisle
Ewing Trailer Park
Gerald H. Center
1013 Jackson Avenue
William M. Champion
306 McLaurin
Robin O. Cotten
626 Park Drive
Omar Dell Craig
Box 163
William Peyton Dodson
P. O. Box 525
Angelo J. Dorizas
204 First National
Bank Bldg.
William M. Dye, Jr.
304 Murry Street
Robert T. Edwards
1001 Jefferson Apts.
T. Marx Huff
Box 190
Thomas R. Ethridge
P. O. Box 566
Anthony Fava
James Oliver Ford
North Mississippi Rural
Legal Services
Thomas H. Freeland, III
Box 269
Gerald A. Gafford
P. O. Box 269
Norman Gillespie
Asst. U.S. Attorney
Lowell E. Grisham
P. O. Box 566
Will A. Hickman
P. O. Box 430
Jere Richmond Hoar
Route 1
William Hooper, Jr.
1525 Jefferson

Charles D. Hosemann
235 Avent Apts.
Clyde Gray Huggins, Jr.
Box 8
William Walker Joor
Box 207
William P. Joyner
Lee Loop
Sam D. Knowlton
Old Taylor Road
William R. Lamb
P. O. Box 349
Alfred Eugene Lee
406 Thomas Street
William Lewis, Jr.
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Route 5, Box 88
Anna Maddan
719 University Ave. #12
Maureen G. Malone
108½ South Lamar
Falton O. Mason, Jr.
819 Filmore
Nick A. Mavar, Jr.
209 Cullen Road
Thomas Richard Mayfield
108½ South Lamar
Robert E. Jack McCormick
426 South Lamar
Taylor H. McElroy
P. O. Box 269
Carl Venson Montgomery
619 University, Apt. 4
A. E. Moreton
110 Vivian Street
Casey Culpeper Pace
619 University Avenue
Fred Barringer Patton
518 Tyler Avenue
F. Edwin Perry
P. O. Box 345
J. W. Price
307 South Lamar
H. M. Ray
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Jean Rand Richey
Country Club Road
Basil W. Richmond, Jr.
426 South Lamar

Bramlett Roberts
Box 507
Alix Henry Sanders
108½ North Lamar
Francis B. Stevens
North Mississippi Rural
Legal Services
108½ South Lamar St.
Joseph Watts Yates
1590½ Buchanan Ave.

PASCAGOULA

Emily V. Baker
Box 1692
Glenn Barlow
P. O. Box 1241
W. E. Belt
P. O. Box 666
Vincent Blackwell
P. O. Box H
Raymond L. Brown
P. O. Box 787
John F. Bryan, III
Drawer 1529
Charles Gray Burdick
Box 787
French Caldwell
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Joe R. Colingo
P. O. Box H
James H. Colmer
P. O. Box 787
John Gordon Corlew
2312 Meadowbrook Dr.
Dan Costello
P. O. Box 2248
Arvis Cumbest
P. O. Drawer 1287
Donald W. Cumbest
P. O. Drawer 1287
Ronnie Donald Cumbest
Box 1287
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706 Watts Avenue
Guy C. Faggard
Box 714
Alfred Lee Felder
Box 1087
Charles W. Ford
P. O. Box 100

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Box 658
H. Bernard Gautier
P. O. Box 299
John D. Gautier
312 Canty Street
Rex Gordon
P. O. Drawer 1529
George W. Howell, Jr.
P. O. Box 149
Albert S. Johnston, III
P. O. Box 1087
Dewitt Russell Jones, Jr.
1503 22nd Street
Ransom P. Jones, III
Box 1607
William B. Jones
P. O. Box 100
Earl Leslie Koskela
Drawer 546
Jesse Elmo Lang
Box 481
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600 Delmas Avenue
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P. O. Box 909
Thomas J. Long
Box 277
Trent Lott
Drawer 1529
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Box 1303
Charles J. May, III
614 Washington Avenue
O. L. McLeod
P. O. Box 1263
C. R. McRae
Box 1692
Carl A. Megehee
P. O. Box 787
Roland J. Mestayer, Jr.
Suit 404
Pascagoula Moss Point
Bank Bldg.
Melvin L. Mitchell
P. O. Box 991
B. C. Moore
P. O. Box 1056

Joe A. Moore
P. O. Box 100
Joann Taylor Myers
2802 Monterey Ave.
William H. Myers
Drawer 1529
Edward S. Nelson
Drawer 1529
Robert H. Oswald
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Judge Merle F. Palmer
Box 59
William J. Palmer
Box 59
Marby R. Penton
Box 506
Roy W. Pike
Drawer 1469
Charles Pitcher
Box 1692
William J. Powers, Jr.
Box 1267
Willard L. Richardson
Box 966
Ernest R. Schroeder
P. O. Drawer 1529
Harold M. Seamen
2303 9th Street
Lloyd Y. Sexton
5006 Telephone Road
Frank E. Shanahan, Jr.
Box 1447
George M. Simmerman
104 S. Pascagoula St.
David A. Stewart, Jr.
Box 635
David D. Thomas
Box 1451
Henry L. Tillman
Box 1445
Judge L. A. Watts
P. O. Box 244
Pat H. Watts, Jr.
P. O. Drawer 1499
Charles J. Weeks
Box 546
Karl Wiesenburg
Box 26
Roy C. Williams
P. O. Box 787

Edmund A. Wilson

P. O. Box 415

W. Roberts Wilson, Jr.

Box 1507

Fielding L. Wright, Jr.

408 Lake Avenue

PASS CHRISTIAN

C. Randall Jones, Jr.

P. O. Box 283

Frank P. Wittmann, III

105 Hursey Street

PELAHATCHIE

Charles G. Clifford

Route 2, Box 231

PETAL

Thurman L. Clark

P. O. Box 366

Gilbert F. Heinbaugh

Box 261

H. B. Lingle

Box 492

La Fare Murphy

Box 136

PHILADELPHIA

Herman W. Alford

Key Building

Thomas L. Booker

Route 8, Box 25 S

Terry Leland Jordan

Box 72

Clayton Lewis

P. O. Box 162

Clayton T. Lewis

P. O. Box 162

William M. Mars

Key Building

Wilburn D. Moore

Box 305

Joe Henry Mulholland

Box 337

Judge Robert Prisock

Chancellor

Bobby F. Sanders

Box 183

Laurel G. Weir

Box 156

William G. Yates, Jr.

P. O. Box 54

PICAYUNE

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P. O. Box 125

Emile J. Gex, Jr.

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Charles R. Holladay

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P. O. Box 269

Leilas Terrell Simpson

309 North Main Street

Lonnie Smith

P. O. Drawer 1076

L. Jack Stewart

Box 608

Ray M. Stewart

P. O. Box 269

Monroe David Tate, II

108 East Canal Street

Robert J. Williams

P. O. Box 189

PLANTERSVILLE

Tulane E. Posey, Jr.

Route 1

PONTOTOC

James E. Bost

P. O. Box 148

Jackson D. Doty

Box 476

William A. Grist

P. O. Box 118

Joe Ray Henderson

P. O. Box 217

Boudie A. Jagers

P. O. Box 364

Byrd P. Mauldin

512 South Main Street

William Fred Randle

512 Liberty Street

James Lamar Roberts, Jr.

P. O. Box 487

William Lowrey Sneed

512 South Main

Charles D. Thomas

First National Bank Bldg.

Judge T. Fred Wicker

Post 1

Joseph E. Winston

Box 42

POPLARVILLE

David R. Smith

Box 393

Martin T. Smith

P. O. Box 393

Ellis C. Stuart, Jr.

Box 304

E. B. Williams

Williams Building

E. B. Williams, Jr.

Williams Building

Lampton O. Williams

P. O. Box 113

PORT GIBSON

Jake Louis Abraham

Route 1

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Edwin D. Davis

Box 602

Joseph Turpin Drake

Robert Douglas Gage, III

Box 224

P. M. Watkins

2nd Floor Person Bldg.

Karl Weil

PRENTISS

Joseph Dale

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Onette E. W. Johnson

Drawer C

Donald G. Kruger

P. O. Drawer 11

Floyd P. Smith

Box 357

PURVIS

William E. Andrews Jr.

Box 306

Elmer A. Canfield

Box 188

Jesse W. Shanks

Box 367

Van Carlton Temple, Jr.

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QUITMAN

Robert E. Covington, Jr.

Box 168

G. F. Dabbs, Jr.

P. O. Box 199

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Box 199
Billy Ernest Harris
Box 304
Andrew J. Reese, Jr.
Box 231
Tally D. Riddell
Box 199
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P. O. Box 359
J. E. Shirley
Box 25
Peter K. Smith
200A South Archusa Ave.

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P. O. Box 265
Luther David Pittman
Eugene C. Tullos
P. O. Box 74
Jerry Lawrence Yeager

RAYMOND

James H. Adams
G. Robert Ferguson
P. O. Drawer 89
William W. Ferguson
Box 300
Hugh B. Gillespie, Jr.
P. O. Box 146
Hugh B. Gillespie, III
Drawer 420
Andrew John Hannon
Route 1, Box 100
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Faculty Drive
Hinds Junior College
Joe G. Moss
Box 144
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P. O. Box 421

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120 Jefferson
Thomas E. Pegram, Jr.
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Marion D. Roten
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Rush M. Clements
210 Locust Street
Herman C. Glazier, Jr.
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Box 193
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Box 453

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Robert L. Crook
William M. Pittman, Jr.
646 Floyce Street

SALTILLO

John Leroy Long
Box 128

SARDIS

George C. Carlson, Jr.
P. O. Box 450
William E. Corr, Jr.
P. O. Box 450
Herbert M. Fant
Rebecca Ann Floyd
62 North Main Street
James McClure, Sr.
P. O. Box 246
James McClure, Jr.
P. O. Box 246

SEMINARY

J. Martin Mooney
P. O. Box 256

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406 West Main
E. R. Arms
James E. Cahill, Jr.
Box 186
T. V. Speck Dixon
222 East Main Street
Leon Edward Hannaford
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Ward Street
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K M Bldg. 406 Main St.
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205 McKie Street
Nathaniel G. Troutt
210 South Ward Street
Robert Quentin Whitwell
505 A Forrest
Raymond D. Williams
P. O. Box 302

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Raynold Chiz
P. O. Box 541

SHELBY

C. W. Burke
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B. G. Perry
Box 188
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6071 Farmington Dr. East
A. L. Pressgrove, Jr.
1369 Statsline Road
Ronald L. Taylor
Box 188

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James E. Brown
Box 29
James A. Bryant
Route 4, Box 152 A
P. L. Douglas
103 West Main Street
Ben F. Hilbun, Jr.
P. O. Box 332
Rolfe L. Hunt, Jr.
Box 781
Edward F. McDowell
Court Square
William Quinn McKee
Court Square
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P. O. Box 414
Gary R. Parvin
Box 782
Larry O. Putt
711 Aspen Road
Judge J. H. Richmond, Jr.
Federal Land Bank
Association Bldg.
J. Wilmot Thompson, Jr.
P. O. Box 535
B. M. Walker, Jr.
P. O. Box 289
Will E. Ward
Box 6
William H. Ward
Drawer 59
Frank L. Watson
Route 1, Box 7A

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Box 68

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Judge J. T. Lowe
Alfred Thomas Tucker, Jr.
Box 826
Jack Norris Tucker
Box 332

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George F. Adams
P. O. Box 1706
M. T. Adams
P. O. Box 1706
Sam H. Allen
647 Allen Street
C. R. Bolton
City Hall Building
Paul Kent Bramlett
Drawer 1523
William H. Brewer
1609 Patterson Drive
Fred M. Bush, Jr.
P. O. Box 466
F. M. Bush, III
Box 466
Gary Lee Carnathan
Box 521
Dudley F. Carr
Box 234
Michael Dale Cooke
601 Magnolia Drive
Albert Peyton Cottrell
409 Garfield Avenue
Glen H. Davidson
207½ Court Street
Charles A. Evans, Jr.
P. O. Box 313
Jeremy J. Eskridge
1416 Mitts Drive
James B. Floyd, III
P. O. Box 1781
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P. O. Box 1146
Thomas J. Gardner, III
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Box 466
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Lumpkin Building

Flavous L. Hutchinson
813 Varsity Drive
Wade H. Lagrone
Box 466
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Court Street
S. H. Long
P. O. Box 1706
Richard Maynard
Box 590
Robert N. McNutt
Colonial Building
Kenneth E. Milam
112 North Broadway
B. T. Mitchell
1112 Houston Street
Guy W. Mitchell, Jr.
P. O. Box 466
Guy W. Mitchell, III
P. O. Box 466
W. P. Mitchell
P. O. Box 29
James L. Mounce
Drawer 1523
Roy O. Parker
2225 West Main Street
Cason Rankin
209½ Court Street
James Hugh Ray
Lumpkin Building
Frank A. Riley
P. O. Box 1026
Jesse B. Rogers
551 North Madison
L. F. Sams, Jr.
Box 466
Arthur Raye Sanders
2605 Ewell Drive
Robert E. Scribner
Box 736
Douglas D. Shands
P. O. Box 673
Billy W. Shelton
P. O. Drawer 589
Jimmy Douglas Shelton
504 Feemster Lake Road
Donald G. Soper
P. O. Box 590
Michael G. Soper
315 Main Street

David Rowe Sparks
826 North Clayton
Robert Kimmons Upchurch
112 North Broadway
Dennis Wayne Vogue
115 North Broadway
James L. Weir
Box 1026
Carroll E. White
P. O. Box 289
Douglas M. Wright
201 Milford Street
Apt. 67

TYLERTOWN

Breed O. Mounger
P. O. Box 231
Breed O. Mounger, Jr.
P. O. Box 231
Joseph Morris Stinson
P. O. Box 226

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G. B. Carmichael
P. O. Box 65
Samuel N. Weaver
P. O. Box 276

VAIDEN

Mack L. Boykin
Box 87
Luther S. Gilmer

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Allen T. Akin
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William G. Beanland
First National Bank
Building
James P. Biedenharn
1201 Cherry Street
Ellis B. Bodron, Jr.
Box 1359
William M. Bost, Jr.
Suite 602 First National
Bank Building
Gerlad E. Braddock
P. O. Drawer 750
Alexander J. Brunini
810 First National Bank
Building
Nathaniel W. Bullard
914 Grove Street
Jack P. Canizaro
304 Hildegard Terrace
George Chaney
P. O. Box 648
William M. Conerly, Jr.
Suite 4-A Emmich
Building
Lucius B. Dabney, Jr.
1515 Walnut Street
Wakins B. Duggins
200 Enchanted Drive
David W. Ellis
P. O. Box 628
John E. Ellis
District Attorney
9th Circuit Court
District
Frank E. Everett, Jr.
P. O. Box 991
Ellis J. Farris
1219 Monroe Street
Cedric L. Feibelman, Jr.
Box 768
Grey Flowers Ferris
Route 1, Box 179

John B. Gee
402 First National Bank
Building
V. W. Good
Merchants National Bank
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Judge Ben Guider
Circuit Court
Richard F. Heffel
Box 60
Charles D. Hosemann
810 First National Bank
Building
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1645 Chambers Street
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Wesley R. Lominick, Jr.
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P. O. Box 1240
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R. Eugene Parker, Jr.
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Building
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Judge Kermit R. Cofer
Chancellor
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P. O. Box 468

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P. O. Box 430

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Lott Building
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P. O. Box 168
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705-C Azalea Drive
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203 Jordan Avenue
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Jordon Avenue
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Mary Holmes College
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Albert Carpenter Pippen
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Box 645
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Box 348
Rupert Ringold
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John M. Sumner
102 South Front Street

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A. H. Sturgeon
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P. O. Box 637
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P. O. Box 637
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P. O. Box 637

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P. O. Box 960
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P. O. Box 82

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East Jefferson Street
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Hegman Building
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P. O. Box 466
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County Court

ANNISTON, ALA.

Gus W. Colvin, Jr.
414 Commercial Bank
Building
John G. Tyler
P. O. Box 334

AUBURN, ALA.

Robert R. Criss
Department of
Economics & Business
Administration
Auburn, University

BIRMINGHAM, ALA.

Milton Anton
2313 Wexford Lane
Irvin H. Buchalter
3137 North Woodridge
Road
Roger M. Flynt
P. O. Box 771
Seeb Holmes
8949 Gadsden Road
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1785 Cornwall Road

George F. Maynard, III
First National Building
Edward H. Winnige
2540 Mountain Woods
Drive

CHICKASAW, ALA.
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129 Baratare Drive

DALEVILLE, ALA.
William C. Spencer
10 Andrews Drive

**DAUPHIN ISLAND,
ALA.**
William S. Fine
P. O. Box 394

**FORT McCLELLAN,
ALA.**
William Denver Eshee, Jr.
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HOMEWOOD, ALA.
Ina Branham Leonard
1725 Windsor Boulevard

MOBILE, ALA.
James H. Brumby
6658 Zeigler Boulevard
Melvin Dovith
P. O. Box 2288
William Byron Harvey
Box 290
William J. Huff
5917 Montfort Road
South
Y. D. Lott
P. O. Box 1828
J. N. Ogden
Box 1828
Wright Patton
4538 Kingsway Drive

TUSCUMBIA, ALA.
Stanley E. Munsey
1035 Hemlock Street

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ALASKA**
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415 L. Street

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Drawer 2940

PHOENIX, ARIZ.
William Thomas Moroney
Suite 204 Title & Trust
Building

**SIERRA, VISTA,
ARIZ.**
Fred P. Talmadge
P. O. Box 638

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c/o College of Law
University, Arizona

YUMA, ARIZ.
John P. McLaurin, III
Box 3327

DERMOTT, ARK.
John F. Gibson, Jr.
Box 217

EL DORADO, ARK.
James E. Baine
200 Jefferson Avenue

**FAYETTEVILLE,
ARK.**
Jerry W. Fleming
1828 Applebury Drive

FT. SMITH, ARK.
Charles Shuffield
4112 Fresno

JASPER, ARK.
Henry Nolen Fancher
Box 233

**LITTLE ROCK,
ARK.**
Thomas A. Buford
12 Kingspark Court
Bud B. Whetstone
400 Tower Building

TEXARKANA, ARK.
Philip B. Purifoy
3322 County Avenue

**APO SAN FRAN-
CISCO, CALIF.**
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HQ USARV SJA
Foreign Claim Division
Lt. Col. Paul V. Dixon
USMACTHAI/
JUSMAGTHAI BOX 540
Capt. Robert H. Taylor, Jr.
587-48-8536 SJA
HQ United States Army,
Vietnam

**BEVERLY HILLS,
CALIF.**
Martha Eugenia Villanea
425 North Oakhurst

BONITA, CALIF.
Gerald L. Myres
3135 Crela Street

**DANA POINT,
CALIF.**
Boyd H. Reynolds
Box 157

FORT ORD, CALIF.
Robert H. Jackson
249 Metz Road

**GRANADA HILLS,
CALIF.**
James Alfred Waits
11043 Aldea Avenue

**LOS ANGELES,
CALIF.**
William Bellinger
Lowrance
P. O. Box 24366
Thomas E. Pegram, III
Box 24 B 88
Toxey Hall Smith
6290 Sunset Boulevard
Suite 1800
Frederick F. Straus
237 S. San Pedro

**NORTHRIDGE,
CALIF.**
Harold Charles Weston
19155 Eccles Street

PASADENA, CALIF.

Sheldon Leroy Foreman
234 East Colorado
Boulevard
Suite 803

SAN FRANCISCO, CALIF.

William J. Lawler
615 Montgomery Street
Suite 320
Rosalind D. Sanders
1479 32nd Avenue

SAN MARINO, CALIF.

Bertrand D. Mouron, Jr.
2986 Sheffield Road

TWENTYNINE PALMS, CALIF.

Cecil E. Gantt
6955 Roberts Avenue

COLORADO SPRINGS, COLO.

Rowan T. Thomas
Suite 346 Janitell One
Building

DENVER, COLO.

George Earl Parker
8994 West Harvard Drive
Alvin L. Smith, Jr.
136 Magnolia Street

GREENWICH, CONN.

James A. Lewis
Partridge Hill Lane

NEW HAVEN, CONN.

Douglas R. Daniels
58 Fountain St. Apt. B-2
Myres Smith McDougal
401-A Yale Station

ROCKVILLE, CONN.

Dennis L. Huffman
720 Dart Hill Road
RFD 3

WEST HARTFORD, CONN.

Nathan Levy, Jr.
7 Craigmoor Road

WASHINGTON, D.C.

Robert Chadwick
6201 Cloverdale Drive
W. M. Colmer
House Office Building
Nannie Mayes Crump
304 4th Street S.E.
Carl J. Felth
Suite 805
810 18th
Ann Dodge Goodbee
4201 Massachusetts
Avenue N.W.
John R. Hailman
4024 Calvert Street N.W.
John H. Holloman, III
Room 2226 New Senate
Office Building
John E. Johnson
286 M Street N.W.
Margaret M. Laurence
753 Warner Building
LCDR Billy Joseph Legg
Office of JAG Navy
Department
Robert Lawrence Lennon
2932 Upton Street N.W.
William Mac Rouse
Office of the Commis-
sioner
Federal Maritime Com-
mission
Raymond L. McGuire
2000 L Street N.W.
Suite 710
Samuel D. McIlwain
815 Connecticut Avenue
N.W.
George Hite McLean, Jr.
2226 New Senate Office
Building
Raymond W. Miller
2540 Massachusetts
Avenue N.W.
Leonard E. Nelson
4933 30th Place N.W.

Robert V. Pollard
Home Loan Bank Board
Harry Ross, Jr.
716 Perpetual Building
Orville F. Rush
1034 Washington
Building
John C. Stennis
Room 5213
New Senate Office
Building
Michael B. Trister
1736 R Street N.W.
Jamie L. Whitten
2413 Rayburn House
Office Building

WILMINGTON, DEL.

Enoch M. Overby, III
Legal Dept. Hercules Inc.

CLEARWATER, FLA.

George A. Mueller
2032 West Ridge Drive

COCO BEACH, FLA.

Sylvester J. Hemleben
2020 North Atlanta
Avenue Apt. 609 South
Twin Towers

GAINESVILLE, FLA.

Winton E. Williams
Holland Law Center
University of Florida

JACKSONVILLE, FLA.

James C. Blanton
P. O. Box 2575

JUPITER, FLA.

W. Dave Womack, Jr.
Inlet Professional
Building
2 Tequesta Drive

LAKE PARK, FLA.

Herbert W. Biggs
510 Lakeshore Apt. 14

LAKE WORTH, FLA.

Albert Jean Gamot Jr.
707 Lucerne Avenue

MARCO ISLAND, FLA.

Lura M. Womack
1207 Mulberry Court

MIAMI, FLA.

John Richard Farrell
2825 South Miami
Avenue

S. William Fuller
3235 N.W. 62nd Street

Louis A. Gily, Jr.

700 N.E. 23rd Street
Joseph Randolph Lipscomb
502 Biscayne Building
19 West Flagler Street

Sidney B. Majure
4200 S.W. 82nd Court

John Witherspoon
880 N.W. 177th Terrace

Richard Morton
350 Lincoln Road

ORANGE PARK, FLA.

Donald W. Williamson
2223 Astor Street Lido 5

PALM BEACH, FLA.

A. Obie Stewart
First National Bank
Building

PENSACOLA, FLA.

O. Gwen Lamar King
98 East Garden Street
Capt. Hugh Barr Miller,
Jr. Ret.
5501 Admiral Doyle
Road

TALLAHASSEE, FLA.

Joshua M. Morse, III
Florida State University
College of Law

TAMPA, FLA.

Andrew J. Mirabole
3008 N. Lincoln Avenue

Morris E. White
P. O. Box 1438

TYNDALE A.F.B., FLA.

Capt. James S. M. Brasfield
2412 Lincoln

WEST PALM BEACH, FLA.

Will A. Nason
2250 Palm Beach Lakes
Boulevard

WILTON MANORS, FLA.

James J. Smith
2800 North Andrews
Avenue

ATHENS, GA.

Edgar Martain Crane
500 Kathwood Drive
Samuel M. Davis
210 Shady Grove Drive
Emmet Neil Young
1073 South Milledge
Avenue

ATLANTA, GA.

Overton A. Currie
1405 Fulton National
Bank Building
James R. Harland, Jr.
822 Fulton Federal
Building
J. B. Hough
P. O. Box 5077
Thomas I. Kent
290 Hillwick Court N.E.
Robert L. McHaney, Jr.
4560 Powers Ferry Road
N.W.

DALTON, GA.

Douglas B. Lewis
Hamilton Memorial
Hospital
P. O. Box 1168

DECATUR, GA.

Earl N. Vaughan
3163 Cedar Brook
Parkway

FORT BENNING, GA.

Capt. James N. Stearns, Jr.
Staff Judge Advocate
Office
U. S. Army Infantry
Center

LITHONIA, GA.

James L. Davis, Jr.
4920 Strafford Mill
Court

LOCUST GROVE, GA.

Janette Blair Clark

MACON, GA.

Thomas L. Adams
4826 Wesleyan Woods
Drive

SMYRNA, GA.

Doris G. Fondren
3410 Atlanta Road S.E.

STONE

MOUNTAIN, GA.
Paul Montgomery, Jr.
Box 902

THOMASTON, GA.

Richard L. Watson
321 West Gordon Street

VALDOSTA, GA.

Major Horace M. Watkins
2308 Pine Cliff Drive

BLOOMINGTON, ILL.

Billy Doggette
112 East Washington
Street

CHAMPAIGN, ILL.

Virgil W. Burgess
1106 N. Champaign
Street

CHICAGO, ILL.

John J. O'Brien
Youngberg Carlson
Company
111 West Jackson Blvd.

DEERFIELD, ILL.

Jay H. Hedgepeth
1458 Berkley Court

ELMHURST, ILL.

Frank L. Calderala
714 S. Parkside Avenue

EVANSTON, ILL.

Martha M. Parsons
348 Ridge Avenue

OFALLON, ILL.

J. D. Thompson
202 Wellesley Drive

PRINCETON, ILL.

Howard B. Trimble
111 Park Avenue East

ROBINSON, ILL.

E. K. Correll
205 Michael Drive

WASHINGTON, ILL.

Martin E. Horn
1316 West Jefferson
Apt. 4

FORT WAYNE, IND.

Ralph B. Elston
1505 Hickory

**INDIANAPOLIS,
IND.**

Harry L. Schroeder
7156 Kingswood Circle

KOEKUK, IOWA

Joel Joseph Kamp
609 Bondeau Street

TOPEKA, KANSAS

Jerry A. Davis
1034 Mylvane Apt. 22

GLASGOW, KY.

John Basil Preston

HAZARD, KY.

James P. Morgan
82 Ashless Street

LEXINGTON, KY.

Cynthia Horn
3337 Commodore Dr.
Apt. 463-B

LOUISVILLE, KY.

James L. Gullett
9010 Maple Road
Charles G. Thomas
1800 Knollwood Road

MAYFIELD, KY.

Roscoe Cross
Route 5

ARCADIA, LA.

J. Rush Wimberly
Box 59

BATON ROUGE, LA.

Henry A. Brumfield, III
P. O. Box 1486
Ted L. Jones
4307 Plank Road
Roy C. Kuyrekendall, Jr.
10887 Sandringham
Drive

James W. Leake
3769 Sholor Court

Charles W. Philips
Drawer 2471

Ralph D. Pruett, Jr.
12453 Buckingham

James W. Ware
950 South Foster Drive
Apt. 33

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Apt. 139 Suffolk Manor

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2103 Burnell Court

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3129-43rd Street

Craig Brigsten
3813 Henican Place

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4325 Manhattan Apt. 307

Howard O. Leach
221 East Gatehouse Drive

James Donald Maxwell
6424 Park Manor Drive

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1810 Emerson

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Hirschel T. Abbott, Jr.
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Beverly C. Adams
8318 Sycamore Place

William H. Beck, Jr.
Suite 2313

225 Baronne Building
John M. Bee

P. O. Box 60118
Alvin J. Bronstein

1110 Royal Street

J. B. Brumfield
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1111 Tulane Avenue
Tom P. Caldwell

P. O. Box 60626
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P. O. Box 60118

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Box 50879

Robert Sharp Forster
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Abner E. Hughes
225 Baronne Street
Suite 1800

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Suite 520

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Corporation
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800 The California Bldg.

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1111 Tulane Avenue

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Louisiana Polytechnic

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602 Ratcliff

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3616 Peach Tree Street

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Box 277

FRANKFORT, MAINE

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12516 Windover Turn

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5617 Eastwood Court

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Robert P. Roberts, Jr.
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Charles Kalcounas
12808 Epping Terrace
Peter M. Stockett
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7711 State Line Road

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11306 East 61st Terrace

SIKESTON, MO.

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Box 82028

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Box 554

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U S Naval Station

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301 Combat Support
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Box 1367

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Avenue

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601 Otranto Villas

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University of South
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School of Law

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Apts.

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Box 2855
M. A. Methvin
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National Bank Bldg.
R. Boyd Pickens, Jr.
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111 Nichols

TYLER, TEX.

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1801 Blossom Lane

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P. O. Box 6392

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Box 1231

ALEXANDRIA, VA.

Rhesa H. Barksdale
Apt. 201
4819 West Braddock Rd.

Capt. Charles L. Clark

5381 Sanger Ave. Apt. 150

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835 Herbert Springs Rd.

LTC Alton H. Harvey

3801 Maryland Street

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1433-A No. Van Dorn St.

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5937 Quantrell Ave.

No. 204

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Fred N. Colmer
Box 1301
Robert De Metz
2661 3 Barick Road

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10119 Blue Coat Drive
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214 Chestnut Street

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2425 Alsop Court

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Thomas D. Yarbrough
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6333 Chestnut Hill Rd.

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10427 S. E. 14th St.

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11th Judicial Circuit

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556 Central Bldg.

VANCOUVER, WASH.

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SAN JUAN, PUERTO RICO

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P. O. Box 3504

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No. 8 Lane Nung An St.

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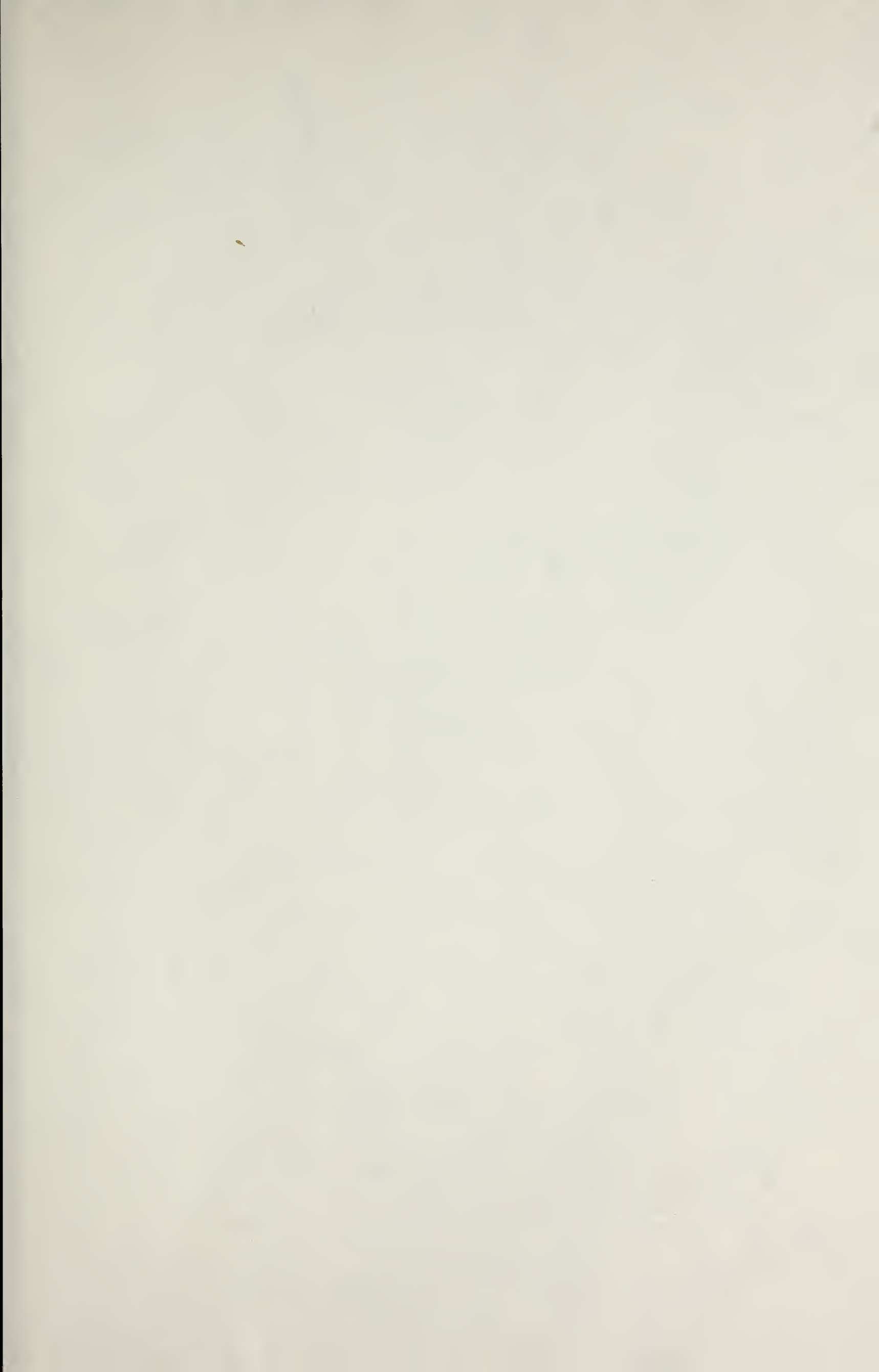
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